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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 9, Original.

THE STATE OF WISCONSIN, COMPLAINANT,

vs.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR.

IN EQUITY.

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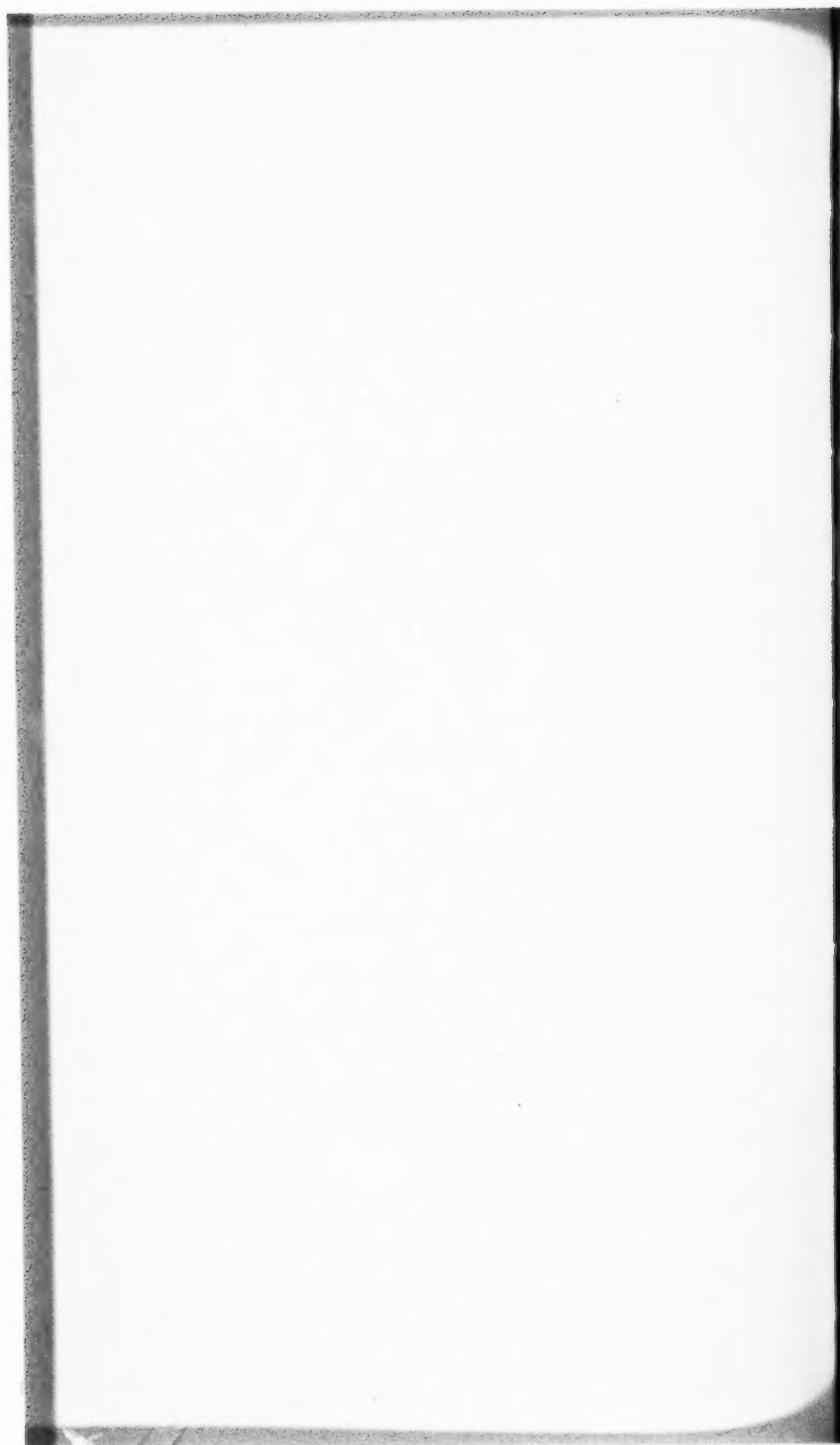
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1 At the Capitol of the United States, in the City of Washington and District of Columbia, being the present seat of the National Government of the United States, on the second Monday of October (being the fourteenth day of the same month), in the year of our Lord one thousand nine hundred and twelve, and of the Independence of the United States the one hundred and thirty-seventh, the Supreme Court of the United States met agreeably to law.

And afterward, to wit, on the 7th day of April, A. D. 1913, the following entry appears of record, viz.:

2 —, Original.

THE STATE OF WISCONSIN, Complainant,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

Mr. Moses Hooper in behalf of counsel for the complainant, submitted to the consideration of the Court a motion for leave to file the bill of complaint in this cause.

April 7, 1913.

Which said motion is in the words and figures following, viz.:

3 In the Supreme Court of the United States, October Term, 1912.

In Equity.

THE STATE OF WISCONSIN

vs.

FRANKLIN K. LANE, Secretary of the Interior.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States, sitting in equity:

Now comes the State of Wisconsin, by its Attorney General, Walter C. Owen, and John C. Thompson, Michael G. Eberlein, and R. A. Hollister, special counsel, and moves the court that the State of Wisconsin be permitted to file its bill of complaint in equity against Franklin K. Lane, Secretary of the Interior of the United States, but a citizen and resident of the State of California, as a cause of which this court has original jurisdiction under Section 2 of Article 3 of the Constitution of the United States and under an Act of Congress of the United States passed March 2, 1901, and that upon filing thereof a

subpena shall issue as provided by Rule 12 of the Rules of Practice in Equity.

THE STATE OF WISCONSIN,
By WALTER C. OWEN,
Attorney General.
JOHN C. THOMPSON,
MICHAEL G. EBERLEIN,
R. A. HOLLISTER,
Of Counsel.

4 And afterwards to wit, on the 14th day of April, A. D. 1913,
the following order appears of record, viz.:

No. —, Original.

THE STATE OF WISCONSIN, Complainant,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

On consideration of the motion of the Complainant for leave to file
a bill in equity herein,

It is now here ordered by the Court that said motion be, and the
same is hereby, granted, and that process issue thereon returnable on
the first day of the next term.

April 14, 1913.

And afterwards, to wit, on the 21st day of April, A. D. 1913, a Bill
of Complaint was filed in words and figures following, viz.:

5

Original Bill of Complaint.

In the Supreme Court of the United States, October Term, 1912.

In Equity.

THE STATE OF WISCONSIN

vs.

FRANKLIN K. LANE, Secretary of the Interior.

To the Honorable Chief Justice and Associate Justices of the Supreme
Court of the United States, sitting in equity:

The State of Wisconsin, one of the United States of America, by its
Attorney General, Walter C. Owen, and John C. Thompson, Michael
G. Eberlein and R. A. Hollister, special counsel, by leave of court first
had and obtained, files this, its bill of complaint, against Franklin K.

Lane, who is the Secretary of the Interior of the United States, and who is a citizen and resident of the State of California.

And whereupon your orator complains and says:

I.

That this suit is instituted in the Supreme Court of the United States to determine the right of the complainant to what are commonly known as school lands within an Indian Reservation or cession and where an Indian Tribe claims some right or interest in the lands in controversy, or in the disposition thereof by the United States; and this suit is authorized and jurisdiction in the present form thereof given by the Act of Congress of March 2, 1901; 31 Stat. at Large, page 950, chap. 808; and the commencement thereof by the State of Wisconsin is also duly authorized by the Legislature and proper officers under and by virtue of chap. 95 of the Laws of 1903 of said State of Wisconsin, duly passed, approved and published and now in full force and effect.

II.

That in and by Section 7 of an Act of Congress of the United States to enable the people of Wisconsin Territory to form a Constitution and State Government and for the admission of such State into the Union, approved August 6, 1846, it was enacted as follows:

"Section 7. And be it further enacted that the following propositions are hereby submitted to the convention which shall assemble for the purpose of forming a constitution for the State of Wisconsin for acceptance or rejection; and if accepted by said convention and ratified by an article in said constitution, they shall be obligatory on the United States.

1. That section numbered 16 in every township of the public lands in said state, and where said section has been sold or otherwise disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted to said state for the use of schools."

That on February 1, 1848, the constitutional convention of the people of said territory, duly called in accordance with said enabling act of congress, adopted a constitution, which was thereafter duly ratified by vote of the people of said territory on the 2d day of March, 1848, in accordance with the provisions of the enabling act aforesaid, and the provisions of said constitution.

That in and by Section 2 of Article 2 of said constitution, all of the propositions of the enabling act of Congress aforesaid were adopted, ratified and confirmed, including the provisions of Section 7 thereof hereinbefore set forth.

III.

That following the adoption of said constitution by an act of Congress of the United States, approved May 29, 1848, said State of Wisconsin was duly admitted into the Union on equal footing with the

original states in all respects whatsoever, with the following boundaries, to-wit: Beginning at the northeast corner of the State of Illinois, that is to say, at a point in the Center of Lake Michigan, where the line of forty-two degrees and thirty minutes of north latitude crosses the same; thence running with the boundary line of the State of Michigan through Lake Michigan, Green Bay, to the mouth of the Menomonee River; thence up the channel of said river to the Brule River; thence up said last mentioned river to Lake Brule; thence along the southern shore of Lake Brule in a direct line to the center of the channel between Middle and South Islands, in the Lake of the Desert; thence in a direct line to the head-waters of the Montreal River, as marked upon the survey made by Captain Cramm; thence down the main channel of the Montreal River to the middle of Lake Superior; thence through the center of Lake Superior to the mouth of the Saint Louis River; thence up the main channel of said river to the first rapids in the same, above the Indian village, according to Nicollet's map; thence due south to the main branch of the river Saint Croix; thence down the main channel of the said river to the Mississippi; thence down the center of the main channel of that river to the northwest corner of the State of Illinois; thence due east with the northern boundary of the State of Illinois to the place of beginning.

IV.

That by virtue of the enabling act aforesaid and the acceptance of its provisions in the constitution of the State of Wisconsin, and the admission of said state into the Union, said State of Wisconsin acquired the fee in Section 16 in all the lands in said state belonging to the United States at the time of the admission of said state into the Union and theretofore or thereafter surveyed, and in and to all lands thereafter acquired then or thereafter surveyed.

V.

That prior to July 9th, 1832, the Menomonee tribe of Indians occupied a small parcel of land situated in the State of Wisconsin, upon the shores of Winnebago Lake, situated in said state; but defined the boundary of their country as follows: On the east side of Green Bay,

8 Fox River and Winnebago Lake; beginning at the south end of Winnebago Lake; thence southeastwardly to the Milwaukee or Manawauky River; thence down said river to its mouth at Lake Michigan; thence north, along the shore of Lake Michigan to the mouth of Green Bay; thence up Green Bay, Fox River, and Winnebago Lake to the place of beginning. And on the west side of Fox River as follows: Beginning at the mouth of Fox River; thence down the east shore of Green Bay, and across its mouth so as to include all the islands of the "Grand Traverse"; thence westerly, on the highlands between the Lake Superior and Green Bay, to the upper forks of the Menomonee River; thence to the Plover portage of the Wisconsin River; thence up the Wisconsin River to the Soft Maple River; thence to the source of the Soft Maple River; thence

west to the Plume River, which falls into the Chippeway River; thence down said Plume River to its mouth; thence down the Chippeway River thirty miles; thence easterly to the forks of the Manoy River; which falls into the Wisconsin River; thence down the said Manoy River to its mouth; thence down the Wisconsin River to the Wisconsin portage; thence across the said portage to the Fox River; thence down the Fox River to its mouth at Green Bay, or the place of beginning.

VI.

That on the 8th day of February, 1831, a treaty was made and concluded at Green Bay, Wisconsin, by and between the said Menomonee tribe of Indians and John H. Eaton, Secretary of War, and Samuel C. Stambaugh, on the part of the United States, a copy of which treaty is as follows:

Treaty of 1831.

Articles of agreement made and concluded at the City of Washington, this eighth day of February, one thousand eight hundred and thirty-one, between John H. Eaton, Secretary of War, and Samuel C. Stambaugh, Indian agent at Green Bay, specially authorized by the President of the United States, and the undersigned chiefs and headmen of the Menomonee Nation of Indians, fully authorized and empowered by the said nation to conclude and settle all matters provided for by this agreement.

9 The Menomonee tribe of Indians, by their delegates in council, this day, define the boundaries of their country as follows, to-wit:

On the east side of Green Bay, Fox River, and Winnebago Lake; beginning at the south end of Winnebago Lake; thence southeastwardly to the Milwauky or Manawauky River; thence down said river to its mouth at Lake Michigan; thence north along the shore of Lake Michigan, to the mouth of Green Bay; thence up Green Bay, Fox River and Winnebago Lake to the place of beginning. And on the west side of Fox River as follows: Beginning at the mouth of Fox River; thence down the east shore of Green Bay, and across its mouth so as to include all the islands of the "Grand Traverse"; thence westerly, on the highlands between the Lake Superior and Green Bay, to the upper forks of the Menomonee River; thence to the Plover portage of the Wisconsin River; thence up the Wisconsin River to the Soft Maple River; thence to the source of the Soft Maple River; thence west to the Plume River, which falls into the Chippeway River; thence down said Plume River, to its mouth; thence down the Chippeway River thirty miles; thence easterly to the forks of the Manoy River, which falls into the Wisconsin River; thence down the said Manoy River to its mouth; thence down the Wisconsin River to the Wisconsin portage; thence across said portage to the Fox

River; thence down Fox River to its mouth at Green Bay, or the place of beginning.

The country described within the above boundaries the Menomonees claim as the exclusive property of their tribe. Not yet having disposed of any of their lands, they receive no annuities from the United States, whereas their brothers, the Pootowottomees on the south, and the Winnebagoes on the west, have sold a great portion of their country, receive large annuities, and are now encroaching upon the lands of the Menomonees. For the purposes, therefore, of establishing the boundaries of their country, and of ceding certain portions of their lands to the United States, in order to secure great and lasting benefits to themselves and posterity, as well as for the purpose of settling the long existing dispute between themselves and the several tribes of the New York Indians, who claim to have purchased a portion of their lands, the undersigned, chiefs and head-men of the Menomonee tribe, stipulate and agree with the United States as follows:

10

First. The Menomonee tribe of Indians declare themselves the friends and allies of the United States, under whose parental care and protection they desire to continue; and although always protesting that they are under no obligation to recognize any claim of the New York Indians to any portion of their country; that they neither sold nor received any value for the land claimed by these tribes; yet at the solicitation of their Great Father, the President of the United States, and as an evidence of their love and veneration for him, they agree that such part of the land described, being within the following boundaries, as he may direct, may be set apart as a home to the several tribes of the New York Indians, who may remove to and settle upon the same within three years from the date of this agreement, viz: beginning on the west side of Fox River, near the "Little Kackalin" at a point known as the "Old Mill Dam"; thence northwest forty miles; thence northeast to the Oconto Creek, falling into Green Bay; thence down said Oconto Creek to Green Bay; thence up and along Green Bay and Fox River to the place of beginning; excluding therefrom all private land claims confirmed and also the following reservation for military purposes: Beginning on the Fox River, at the mouth of the first creek above Fort Howard; thence north sixty-four degrees west to Duck Creek; thence down said Duck Creek to its mouth; thence up and along Green Bay and Fox River to the place of beginning. The Menomonee Indians also reserve for the use of the United States, from the country herein designated for the New York Indians, timber and fire-wood for the United States garrison, and as much land as may be deemed necessary for public highways, to be located by the direction and at the discretion of the President of the United States. The country hereby ceded to the United States for the benefit of the New York Indians contains by estimation about five hundred thousand acres, and includes all their improvements on the west side of Fox River. As it is intended for a home for the several tribes of the New York Indians who may be residing upon the lands at the expiration of three years from this date, and for none others, the President of

the United States is hereby empowered to apportion the lands among the actual occupants at that time, so as not to assign to any tribe a greater number of acres than may be equal to one hundred
11 for each soul actually settled upon the lands, and if, at the time of such apportionment, any lands shall remain unoccupied, by any tribe of the New York Indians, such portion as would have belonged to said Indians, had it been occupied, shall revert to the United States. That portion, if any, so reverting, to be laid off by the President of the United States. It is distinctly understood that the lands hereby ceded to the United States for the New York Indians are to be held by those tribes, under such tenure as the Menomonee Indians now hold their lands, subject to such regulations and alterations of tenure as Congress and the President of the United States shall from time to time think proper to adopt.

Second. For the above cession to the United States for the benefit of the New York Indians the United States consent to pay the Menomonee Indians twenty thousand dollars, five thousand to *the* paid on the first day of August next, and five thousand annually thereafter, which sums shall be applied to the use of the Menomonees after such manner as the President of the United States may direct.

Third. The Menomonee tribe of Indians, in consideration of the kindness and protection of the Government of the United States, and for the purpose of securing to themselves and posterity a comfortable home, hereby cede and forever relinquish to the United States all their country on the southeast side of Winnebago Lake, Fox River and Green Bay, which they describe in the following boundaries, to-wit: Beginning at the south end of Winnebago Lake and running in a southeast direction to Milwauky or Manawauky River; thence down said river to its mouth; thence north, along the shore of Lake Michigan to the entrance of Green Bay; thence up and along Green Bay, Fox River and Winnebago Lake to the place of beginning, excluding all private land claims which the United States have heretofore confirmed and sanctioned. It is also agreed that all the islands which lie in the Fox River and Green Bay are likewise ceded; the whole comprising by estimation, two million five hundred thousand acres.

Fourth. The following described tract of land, at present owned and occupied by the Monomonee Indians, shall be set apart
12 and designated for their future homes, upon which their improvements as an agricultural people are to be made. Beginning on the west side of Fox River, at the "Old Mill Dam", near the "Little Kackalin", and running up and along said river to the Winnebago Lake; thence along said lake to the mouth of Fox River; thence up Fox River to the Wolf River; thence up Wolf River to a point southwest of the west corner of the tract herein designated for the New York Indians; thence northeast to said west corner; thence southeast to the place of beginning. The above reservation being made to the Monomonee Indians for the purpose of weaning them from their wandering habits, by attaching them to comfortable homes, the President of the United States, as a mark of affection for his children of the Menomonee tribe, will

cause to be employed, five farmers of established character for capacity, industry, and moral habits, for ten successive years, whose duty it shall be to assist the Menomonee Indians in the cultivation of their farms, and to instruct their children in the business and occupation of farming. Also, five females shall be employed, of like good character, for the purpose of teaching young Menomonee women in the business of useful housewifery during a period of ten years. The annual compensation allowed to the farmers shall not exceed five hundred dollars, and that of the females three hundred dollars. And the United States will cause to be erected houses suited to their condition on said lands as soon as the Indians agree to occupy them, for which ten thousand dollars shall be appropriated; also, houses for the farmers, for which three thousand dollars shall be appropriated; to be expended under the direction of the Secretary of War. Whenever the Monomonees thus settle their lands they shall be supplied with useful household articles, horses, cows, hogs, and sheep, farming utensils, and other articles of husbandry necessary to their comfort, to the value of six thousand dollars; and they desire that some suitable device may be stamped upon such articles to preserve them from sale or barter to evil-disposed white persons, none of which, nor any other articles with which the United States may at any time furnish them, shall be liable to sale, or be disposed of or bargained, without permission of the agent. The whole to be under the immediate care of the

13 farmers employed to remain among said Indians, but subject to the general control of the United States Indian agent at Green Bay, acting under the Secretary of War. The United States will erect a grist and saw mill on Fox River for the benefit of the Menomonee Indians, and employ a good miller, subject to the direction of the agent, whose business it shall be to grind the grain required for the use of the Menomonee Indians and saw the lumber necessary for building on their lands, as also to instruct such young men of the Menomonee Nation as desire to and conveniently can be instructed in the trade of a miller. The expenses of erecting such mills and a house for the miller to reside in, shall not exceed six thousand dollars, and the annual compensation of the miller shall be six hundred dollars, to continue for ten years. And if the mills so erected by the United States can saw more lumber or grind more grain than is required for the proper use of said Menomonee Indians, the proceeds of such milling shall be applied to the payment of other expenses occurring in the Green Bay agency, under the direction of the Secretary of War.

In addition to the above provision made for the Menomonee Indians, the President of the United States will cause articles of clothing to be distributed among their tribe at Green Bay, within six months from the date of this agreement, to the amount of eight thousand dollars, and flour and wholesome provisions to the amount of one thousand dollars, one thousand dollars to be paid in specie; the cost of the transportation of the clothing and provisions to be included in the sum expended. There shall also be allowed annually thereafter, for the space of twelve successive years, to the Menomonee

tribe, in such manner and form as the President of the United States shall deem most beneficial and advantageous to the Indians, the sum of six thousand dollars. As a matter of great importance to the Menomonees, there shall be one or more gun and blacksmith's shops erected, to be supplied with a necessary quantity of iron and steel, which, with a shop at Green Bay, shall be kept up for the use of the tribe, and continued at the discretion of the President of the United States. There shall also be a house for an interpreter to reside in, erected at Green Bay, the expense not to exceed five hundred dollars.

14 Fifth. In the treaty of Butte des Morts, concluded in August, 1827, an article is contained, appropriating one thousand five hundred dollars annually, for the support of schools in the Menomonee country. And the representatives of the Menomonee Nation, who are parties hereto, require, and it is agreed to, that said appropriation shall be increased five hundred dollars and continued for ten years from this date, to be placed in the hands of the Secretary of War, in trust for the exclusive use and benefit of the Menomonee tribe of Indians, and to be applied by him to the education of the children of the Menomonee Indians, in such manner as he may deem most advisable.

Sixth. The Menomonee tribe of Indians shall be at liberty to hunt and fish on the lands they have now ceded to the United States, on the east side of Fox River and Green Bay, with the same privilege they at present enjoy, until it be surveyed and offered for sale by the President; they conducting themselves peaceably and orderly. The chiefs and warriors of the Menomonee nation, acting under the authority and on behalf of their tribe, solemnly pledge themselves to preserve peace and harmony between their people and the Government of the United States forever. They neither acknowledge the power nor protection of any other State or people. A departure from this pledge by any portion of their tribe shall be a forfeiture of the protection of the United States Government, and their annuities will cease. In thus declaring their friendship for the United States, however, the Menomonee tribe of Indians, having the most implicit confidence in their Great Father, the President of the United States, desire that he will, as a kind and faithful guardian of their welfare, direct the provisions of this compact to be carried into immediate effect. The Menomonee chiefs request that such part of it as relates to the New York Indians be immediately submitted to the representatives of their tribes. And if they refuse to accept the provision made for their benefit, and to remove upon the lands set apart for them, on the west side of Fox River, that he will direct their immediate removal from the Menomonee country; but if they agree to accept of the liberal offer made to them by the parties of this compact, then the Menomonee tribe, as dutiful children of their Great

15 Father the President, will take them by the hand as brothers, and settle down with them in peace and friendship.

The boundary, as stated and defined in this agreement, of the Menomonee country, with the exception of the cessions hereinbefore made to the United States, the Menomonees claim as their country;

that part of it adjoining the farming country, on the west side of Fox River, will remain to them as heretofore, for a hunting ground, until the President of the United States shall deem it expedient to extinguish their title. In that case the Menomonee tribe promise to surrender it immediately, upon being notified of the desire of the Government to possess it; the additional annuity then to be paid to the Menomonee tribe to be fixed by the President of the United States. It is conceded to the United States that they may enjoy the right of making such roads, and of establishing such military posts, in any part of the country now occupied by the Menomonee Nation, as the President at any time may think proper.

As a further earnest of the good feeling on the part of their Great Father, it is agreed that the expenses of the Menomonee delegation to the city of Washington, and of returning, will be paid, and that a comfortable suit of clothes will be provided for each; also, that the United States will cause four thousand dollars to be expended in procuring fowling guns and ammunition for them; and likewise, in lieu of any garrison rations, hereafter allowed or received by them, there shall be procured and given to said tribe one thousand dollars' worth of good and wholesome provisions annually, for four years, by which time it is hoped their hunting habits may cease and their attention be turned to the pursuits of agriculture.

Supplementary Articles.

First. It is agreed between the undersigned, commissioners on behalf of the United States, and the chiefs and warriors representing the Menomonee tribe of Indians, that, for the reasons above expressed, such parts of the first article of the agreement entered into between the parties hereto, on the eighth instant, as limits the removal and settlement of the New York Indians upon the lands therein provided for their future homes, to three years, shall be altered and amended, so as to read as follows: That the President of the United States shall prescribe the time for the removal and settlement of the New York Indians upon the lands thus provided for them; and, at the expiration of such reasonable time, he shall apportion the land among the actual settlers, in such manner as he shall deem equitable and just. And if, within such reasonable time as the President of the United States shall prescribe for that purpose, the New York Indians shall refuse to accept the provisions made for their benefit, or having agreed, shall neglect or refuse to remove from New York and settle on the said lands, within the time prescribed for that purpose, that then, and in either of these events, the lands aforesaid shall be and remain the property of the United States, according to the said first article, excepting so much thereof as the President shall deem justly due to such of the New York Indians as shall actually have removed to and settled on the said lands.

Second. It is further agreed that the part of the sixth article of the agreement aforesaid, which requires the removal of those of the New York Indians who may not be settled on the lands at the end of

three years, shall be so amended as to leave such removal discretionary with the President of the United States; the Menomonce Indians having full confidence that in making his decision he will take into consideration the welfare and prosperity of their nation: Provided, that for the purpose of establishing the rights of the New York Indians on a permanent and just footing, the said treaty shall be ratified with the express understanding that two townships of land on the east side of the Winnebago Lake, equal to forty-six thousand and eighty acres, shall be laid off, (to commence at some point to be agreed on) for the use of the Stockbridge and Munsee tribes; and that the improvements made on the lands now in the possession of the said tribes, on the east side of the Fox River, which said lands are to be relinquished, shall, after being valued by a commissioner to be appointed by the President of the United States, to be paid for by the Government: Provided, however, That the valuation of such improvements shall not exceed the sum of twenty-five thousand dollars; and

17 going, equal to twenty-three thousand and forty acres, laid off and granted for the use of the Brothertown Indians, who are to be paid, by the Government, the sum of one thousand six hundred dollars for the improvements on the lands now in their possession on the east side of Fox River, and which lands are to be relinquished by the Indians; also, that a new line shall be run, parallel to the southwestern boundary line or course of the tract of five hundred thousand acres described in the first article of this treaty, and set apart for the New York Indians, to commence at a point on the west side of the Fox River, and one mile above the Grand Chute on Fox River, and at a sufficient distance from the said boundary line, as established by the said first article, as shall comprehend the additional quantity of two hundred thousand acres of land, on and along the west side of Fox River, without including any of the confirmed private land claims on the Fox River, and which two hundred thousand acres shall be a part of the five hundred thousand acres intended to be set apart for the Six Nations of the New York Indians and the St. Regis tribe; and that an equal quantity to that which is added on the southwestern side shall be taken off from the northeastern side of the said tract, described in that article on the Oconto Creek, to be determined by a commissioner to be appointed by the President of the United States; so that the whole number of acres to be granted to the Six Nations and St. Regis tribe of Indians shall not exceed the quantity originally stipulated by the treaty.

Proclaimed July 8, 1832.

VII.

That by virtue of said treaty the said tract of land described as follows, to-wit: Beginning at the south end of Winnebago Lake and running in a southeast direction to the Milwaukee or Manawauky River; thence down said river to its mouth; thence north, along the shore of Lake Michigan to the entrance of Green Bay; thence up and along Green Bay, Fox River and Winnebago Lake to the place of be-

ginning, excluding all private land claims which the United States have heretofore confirmed and sanctioned, was forever ceded to the United States.

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VIII.

That by virtue of said treaty a tract of land was set apart for the New York Indians, described as follows, to-wit: Beginning on the west side of Fox River, near the "Little Kackalin", at a point known as the "Old Mill Dam"; thence northwest forty miles; thence northeast to Oconto Creek, falling into Green Bay; thence down said Oconto Creek to Green Bay; thence up and along Green Bay and Fox River to the place of beginning; excluding therefrom all private land claims confirmed, and also the following reservation for military purposes: Beginning on the Fox River, at the mouth of the first creek above Fort Howard; thence north sixty-four degrees west to Duck Creek; thence down said Duck Creek to its mouth; thence up and along Green Bay and Fox River to the place of beginning.

IX.

That by virtue of said treaty the said unceded lands claimed by the said tribe of Menomonee Indians were divided into two classes of property, to-wit: One a part set aside to be held by the said Menomonees designated for their future homes upon which their improvements as an agricultural people are to be made, described as follows: Beginning on the west side of Fox River, at the "Old Mill Dam," near the "Little Kackalin," and running up and along said river to the Winnebago Lake; thence along said lake to the mouth of Fox River; thence up Fox River to the Wolf River; thence up Wolf River to a point southwest of the west corner of the tract herein designated for the New York Indians; thence northeast to said west corner; thence southeast to the place of beginning.

X.

That by virtue of the express terms of said treaty it was expressly stipulated by said Indians that that part or parcel of said land originally claimed by the Menomonee Indians, with the exception of those parts ceded to the United States, which adjoin the tract herein described and set out as the agricultural part, should remain
19 to the said Indians for a hunting ground, until the President of the United States should deem it expedient to extinguish their title, in which case the said Menomonee tribe of Indians promised to surrender it immediately upon being notified of the desire of the Government to possess it.

XI.

That said treaty was conditionally ratified July 9th, 1832, and thereafter such amendments were made which altered the boundaries

of the tract of land set apart for the New York Indians, as follows, to-wit: Beginning on the said treaty line of the old mill-dam on Fox River, and thence extending up along Fox River to the Little Rapid Croche; from thence running a northwest course three miles; thence on a line running parallel with the several courses of Fox River, and three miles distant from the river, until it will intersect a line, running on a northwest course, commencing at a point one mile about the Grand Chute; thence on a line running northwest, so far as will be necessary to include, between the said last line and the line described as the southwestern boundary-line of the five hundred thousand acres in the treaty aforesaid, the quantity of two hundred thousand acres; and thence running northeast until it will intersect the line forming the southwestern boundary-line aforesaid, and from thence along the said line to the old mill dam, or place of beginning; containing two hundred thousand acres, which said treaty as amended was finally proclaimed and ratified March 13, 1835.

XII.

That thereafter on the 3rd day of September, 1836, a treaty was made and concluded at Cedar Point, on the Fox River, near Green Bay, in the territory of Wisconsin, between Henry Dodge, Governor of said territory of Wisconsin, commissioner on the part of the United States, on the one part, and the chiefs and head-men of the Menomonee Nation of Indians on the other part, a copy of which treaty is as follows:

20

Treaty of 1836.

Articles of agreement made and concluded at Cedar Point on Fox River, near Green Bay, in the Territory of Wisconsin, this third day of September, in the year of our Lord one thousand eight hundred and thirty-six, between Henry Dodge, governor of said Territory of Wisconsin, commissioner on the part of the United States, on the one part, and the chiefs and head-men of the Menomonee Nation of Indians on the other part.

Article First. The said Menomonee Nation agree to cede to the United States all of that tract or district of country included within the following boundaries, viz: Beginning at the mouth of Wolf River, and running up and along the same to a point on the north branch of said river where it crosses the extreme north or rear line of the five hundred thousand acre tract heretofore granted to the New York Indians; thence following the line last mentioned, in a northeasterly direction, three miles; thence in a northwardly course, to the upper forks of the Menomonee River, at a point to intersect the boundary line between the Menomonee and Chippewa Nation of Indians; thence following the said boundary-line last mentioned in an easterly direction as defined and established by the treaty of the Little Butte des Morts in 1827, to the Smooth Rock or Shos-kin-aubie River; thence down the said river to where it empties into Green Bay, between the Little and Great Bay de Noquet; thence up and

along the west side of Green Bay (and including all the islands therein not heretofore ceded) to the mouth of the Fox River; thence up and along the west side of Winnebago Lake, (including the islands therein) to the mouth of Fox River, where it empties into said lake; thence up and along said Fox River to the place of beginning, (saving and reserving out of the district of country above ceded and described, all that part of the five hundred thousand acre tract granted by the treaties between the Menomonees and the United States, made on the eighth day of February, A. D. 1831, and on the twenty-seventh day of October, A. D. 1832, which may be situated within the boundaries hereinbefore described), the quantity of land contained in the tract hereby ceded being estimated at about four millions of acres.

21 And the said Menomonee Nation do further agree to cede and relinquish to the United States all that tract or district of country lying upon the Wisconsin River in said Territory, and included within the following boundaries, viz: Beginning at a point upon said Wisconsin River, two miles above the grant or privilege heretofore granted by said nation and the United States to Amable Grignon; thence running up and along said river forty-eight miles in a direct line, and being three miles in width on each side of said river; this tract to contain eight townships or one hundred and eighty-four thousand three hundred and twenty acres of land.

Article Second. In consideration of the cession of the aforesaid tract of land, the United States agree to pay to the said Menomonee Nation, at the lower end of Wah-ne-kun-nah Lake in their own country, or at such other place as may be designated by the President of the United States, the sum of twenty thousand dollars per annum for the term of twenty years.

The United States further agree to pay and deliver to the said Indians, each and every year during the said term of twenty years, the following articles: Three thousand dollars worth of provisions; two thousand pounds of tobacco; thirty barrels of salt; also the sum of five hundred dollars per year during the same term, for the purchase of farming utensils, cattle, or implements of husbandry, to be expended under the direction of the superintendent or agent. Also to appoint and pay two blacksmiths, to be located at such places as may be designated by the said superintendent or agent, to erect (and supply with necessary quantity of iron, steel, and tools), two blacksmith shops, during the same term.

The United States shall also pay the just debts of the said Menomonee Indians, agreeably to the schedule hereunto annexed amounting to the sum of ninety-nine thousand seven hundred and ten dollars and fifty cents: Provided, always, That no portion of said debts shall be paid until the validity and justice of each of them shall have been inquired into by the commissioner of Indian affairs, who shall in no instance increase the amount specified in said schedule, but who shall allow the sum specified, reject it entirely, or reduce it as upon examination and proof may appear just; and if any part of said sum is left, after paying said debts to be adjudged to be just, then such surplus shall be paid to the said Indians for their own use.

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And whereas the said Indians are desirous of making some provision and allowance to their relatives and friends of mixed blood, the United States do further agree to pay the sum of eighty thousand dollars, to be divided among all such persons of mixed blood as the chiefs shall hereafter designate; said sum to be apportioned and divided under the direction of a commissioner to be appointed by the President: Provided always, That no person shall be entitled to any part of said fund unless he is of Indian descent and actually resident within the boundaries described in the first article of this treaty; nor shall anything be allowed to any such person who may have received any allowance under any previous treaty. The portion of this fund allowed by the commissioner to those half-breeds who are orphans, or poor or incompetent to make a proper use thereof, shall be paid to them in installments or otherwise, as the President may direct.

Article Third. The said Menomonee Nation do agree to release the United States from all such provisions of the treaty of 1831 and 1832, aforesaid, as requires the payment of farmers, blacksmiths, millers, etc. They likewise relinquish all their right under said treaty to appropriation for education, and to all improvements made or to be made upon their reservation on Fox River and Winnebago Lake, together with the cattle, farming utensils or other articles furnished or to be furnished to them under said treaty. And in consideration of said release and relinquishment, the United States stipulate and agree that the sum of seventy-six thousand dollars shall be allowed to the said Indians, and this sum shall be invested in some safe stock, and the interest thereof as it accrues shall also be so vested until such time as in the judgment of the President the income of the aggregate sum can be usefully applied to the execution of the provisions in the said fourth article, or to some other purposes beneficial to the said Indians.

Article Fourth. The above annuities shall be paid yearly and every year during the said term, in the month of June or July, or as soon thereafter as the amount shall be received; and the said Menomonee Nation do agree to remove from the country ceded within one year after the ratification of this treaty.

This treaty shall be binding and obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

Proclaimed February 15, 1837.

Here follows schedule of payment.

Which said treaty was duly ratified and proclaimed.

XIII.

That by virtue of said treaty the said Menomonee Nation ceded to the United States the following described tract of land, to-wit: Beginning at the mouth of Wolf River, and running up and along the same point to a point on the north branch of said river where it crosses the extreme north or rear line of the five hundred thousand acre tract heretofore granted to the New York Indians; thence fol-

lowing the line last mentioned, in a northeastwardly direction, three miles; thence in a northwardly course, to the upper forks of the Menomonee River, at a point to intersect the boundary line between the Menominee and Chippeway Nation of Indians; thence following the said boundary line last mentioned in an eastwardly direction as defined and established by the treaty of the Little Butte des Morts, in 1827, to the Smooth Rock or Shos-kin-aubie River; thence down the said river to where it empties into Green Bay, between the Little and Great Bay de Noquet; thence up and along the west side of Green Bay (and including all the islands therein not heretofore ceded) to the mouth of Fox River; thence up and along the said Fox River, and along the west side of Winnebago Lake (including the islands therein) to the mouth of Fox River, where it empties into said lake; thence up and along said Fox River to the place of beginning, (saving and reserving out of the district of country above ceded and described, all that part of the five hundred thousand acre tract granted by the treaties between the Menomonees and the United States, made on the eighth day of February, A. D. 1831, and on the twenty-seventh day of October, A. D. 1832, which may be situated within the boundaries hereinbefore described), the quantity
24 of land contained in the tract hereby ceded being estimated at about four millions of acres.

XIV.

That on the 18th day of October, 1848, at Lake Pow-aw-hay-kon-nay, in the State of Wisconsin, a treaty was made and concluded between the Menomonee tribe of Indians, by their chiefs and head-men, and by William Medill, a commissioner duly appointed by the United States, for and in its behalf, which treaty is as follows, and which said treaty was duly ratified January 23d, 1849:

Treaty of 1848.

Articles of a treaty made and concluded at Lake Pow-aw-hay-kon-nay, in the State of Wisconsin, on the eighteenth day of October, one thousand eight hundred and forty-eight, between the United States of America, by William Medill, a commissioner duly appointed for that purpose, and the Menomonee tribe of Indians, by the chiefs, head-men and warriors of said tribe.

Article 1. It is stipulated and solemnly agreed that the peace and friendship now so happily subsisting between the Government and people of the United States and the Menomonee Indians shall be perpetual.

Article 2. The said Menomonee tribe of Indians agree to cede, and do hereby cede, sell, and relinquish to the United States, all their lands in the State of Wisconsin, wherever situated.

Article 3. In consideration of the foregoing cession the United States agree to give, and do hereby give, to said Indians for a home, to be held as Indians' lands are held, all that country or tract of land ceded to the said United States by the Chippewa Indians in the

Mississippi and Lake Superior, in the treaty of August 2, 1847, and the pillager band of Chippewa Indians, in the treaty of August 21, 1847, which may not be assigned to the Winnebago Indians, under the treaty with that tribe of October 13, 1846, and which is guaranteed to contain not less than six hundred thousand acres.

Article 4. In further and full consideration of said cession, the United States agree to pay the sum of three hundred and
25 fifty thousand dollars, at the several times, in the manner and for the purposes following, viz:

To the chiefs, as soon after the same shall be appropriated by Congress as may be convenient, to enable them to arrange and settle the affairs of their tribe preparatory to their removal to the country set apart for and given to them as above, thirty thousand dollars.

To such person of mixed blood, and in such proportion to each as the chiefs in council, and a commissioner to be appointed by the President, shall designate and determine, and as soon after the appropriation thereof as may be found practicable and expedient, forty thousand dollars.

In such manner and at such times as the President shall prescribe, in consideration of their removing themselves, which they agree to do, without further cost or expense to the United States, twenty thousand dollars.

In such manner and at such times as the President shall prescribe, in consideration of their subsisting themselves, the first year after their removal, which they agree to do, without further cost of expense on the part of the United States, twenty thousand dollars.

To be laid out and applied, under the direction of the President, in the establishment of a manual-labor school, the erection of a grist and saw mill, and other necessary improvements in their new country, fifteen thousand dollars.

To be laid out and applied, under the direction of the President, in procuring a suitable person to attend and carry on the said grist and saw mill for a period of fifteen years, nine thousand dollars.

To be laid out and applied, under the direction of the President, in continuing and keeping up a blacksmith's shop, and providing the usual quantity of iron and steel for the use and benefit of said tribe, for a period of twelve years, commencing with the year one thousand eight hundred and fifty-seven, and when all provisions for blacksmith's shops under the treaty of 1836 shall cease, eleven thousand dollars.

To be set apart, applied, and distributed under the direction of the President, in payment of individual improvements on the
26 tribe upon the lands above ceded to the United States, five thousand dollars.

And the balance, amounting to the sum of two hundred thousand dollars, to be paid over to the tribe, as Indian annuities are required to be paid, in ten equal annual installments, commencing with the year one thousand eight hundred and fifty-seven, and when their annuities or annual installments under the treaty of 1836 shall have ceased.

Article 5. It is stipulated and agreed that the sum now invested

in stocks under the Senate's amendment to the treaty of 1836, with the interest due thereon at this time, shall be and remain invested, under the direction of the President, and that the interest hereafter arising therefrom shall be disposed of as follows: That is to say, so much thereof as may be necessary to the support and maintenance of the said manual-labor school, and other means of education, and the balance be annually paid over in money as other annuities, or applied for the benefit and improvement of said tribe, as the President, on consultation with the chiefs, may from time to time determine.

Article 6. To enable the said Indians to explore and examine their new country, and as an inducement to an early removal thereto, it is agreed that the United States will pay the necessary expenses of a suitable delegation, to be selected for that purpose, under the direction of the President.

Article 7. It is alleged that there were less goods delivered to the said Indians at the annuity payment of 1837 than were due and required to be paid and delivered to them under the stipulations of their treaties with the United States then in force; and it is therefore agreed that the subject shall be properly investigated, and that full indemnity shall be made to them for any loss which they may be shown to have sustained.

Article 8. It is agreed that the said Indians shall be permitted if they desire to do so, to remain on the lands hereby ceded for and during the period of two years from the date hereof, and until the President shall notify them that the same are wanted.

Article 9. It is stipulated that Robert Grignon, who has erected a saw-mill upon the Little Wolf River at his own expense, for the benefit and at the request of said Indians, shall have the
27 right of a pre-emptor to the lands upon which such improvements are situated, not exceeding, in quantity, on both sides of said river, one hundred and sixty acres.

Article 10. This treaty to be binding on the contracting parties as soon as it is ratified by the President and Senate of the United States.

XV.

That on the 12th day of May, 1854, a treaty was entered into at the Falls of the Wolf River, in the State of Wisconsin, between said Monomonee Tribe of Indians by the chiefs and head-men and warriors of said tribe and in behalf of the United States by Francis Huebschmann, which said treaty is as follows:

Treaty of May, 1854.

Franklin Pierce, President of the United States of America, to all and singular to whom these presents shall come, greeting:

Whereas a treaty was made and concluded at the Falls of Wolf River, in the State of Wisconsin, on the twelfth day of May, one thousand eight hundred and fifty-four, between the United States of

America, by Francis Huebschmann, superintendent of Indian affairs, duly authorized thereto, and the Menomonee tribe of Indians, by the chiefs, head-men, and warriors of said tribe, such articles being supplementary and amendatory to the treaty made between the United States and said tribe on the eighteenth day of October, one thousand eight hundred and forty-eight, which treaty is in the words following, to-wit:

Articles of agreement made and concluded at the Falls of Wolf River, in the State of Wisconsin, on the twelfth day of May, one thousand eight hundred and fifty-four, between the United States of America, by Francis Huebschmann, superintendent of Indian affairs, duly authorized thereto, and the Menomonee tribe of Indians, by the chiefs, head-men, and warriors of said tribe, such articles being supplementary and amendatory to the treaty made between the United States and said tribe on the eighteenth day of October, one thousand eight hundred and forty-eight.

28 Whereas, among other provisions contained in the treaty in the caption mentioned, it is stipulated that for and in consideration of all the lands owned by the Menomonees, in the State of Wisconsin, wherever situated, the United States should give them all that country or tract of land ceded by the Chippewa Indians of the Mississippi and Lake Superior, in the treaty of the second of August, eighteen hundred and forty-seven, and by the Pillager band of Chippewa Indians in the treaty of the twenty-first of August, eighteen hundred and forty-seven, which had not been assigned to the Winnebagoes, guaranteed to contain not less than six hundred thousand acres; should pay them forty thousand dollars for removing and subsisting themselves; should give them fifteen thousand dollars for the establishment of a manual-labor school, the erection of a grist and saw mill, and for the necessary improvements in their new country; should cause to be laid out and expended in the hire of a miller, for the period of fifteen years, nine thousand dollars; and for continuing and keeping up a blacksmith shop and providing iron and steel for twelve years, commencing on the first of January, eighteen hundred and fifty-seven, eleven thousand dollars.

And whereas upon manifestation of great unwillingness on the part of said Indians to remove to the country west of the Mississippi River, upon Crow Wing, which had been assigned them, and a desire to remain in the State of Wisconsin, the President consented to their locating temporarily upon the Wolf and Oconto Rivers.

Now, therefore, to render practicable the stipulated payments herein recited, and to make exchange of the lands given west of the Mississippi for those desired by the tribe, and for the purpose of giving them the same for a permanent home, these articles are entered into.

Article 1. The said Menomonee tribe agree to cede, and do hereby cede, sell, and relinquish to the United States all lands assigned to them under the treaty of the eighteenth of October, eighteen hundred and forty-eight.

Article 2. In consideration of the foregoing cession the United States agree to give, and do hereby give, to said Indians, for a home,

29 to be held as Indian lands are held, that tract of country lying upon the Wolf River, in the State of Wisconsin, commencing at the southeast corner of township 28 north, of range 16 east, of the fourth principal meridian, running west twenty-four miles, thence north eighteen miles, thence east twenty-four miles, thence south eighteen miles, to the place of beginning, the same being townships 28, 29 and 30, of ranges 13, 14, 15 and 16, according to the public surveys.

Article 3. The United States agree to pay, to be laid out and applied under the direction of the President at the said location, in the establishment of a manual-labor school, the erection of a grist and saw mill, and other necessary improvements, fifteen thousand dollars; in procuring a suitable person to attend and carry on the said grist and saw mill for a period of fifteen years, nine thousand dollars; in continuing and keeping up a blacksmith shop and providing the usual quantity of iron and steel for the use of said tribe for a period of twelve years, commencing with the year eighteen hundred and fifty-seven, eleven thousand dollars; and the United States further agree to pay the said tribe, to be applied under the direction of the President, in such manner and at such times as he may deem advisable, for such purposes and uses as in his judgment will best promote the improvement of the Menomonees, the forty thousand dollars stipulated to be applied to their removal and subsistence west of the Mississippi. It being understood that all other beneficial stipulations in said treaty of 1848 are to be fulfilled as therein provided.

Article 4. In consideration of the difference in extent between the lands hereby ceded to the United States and the lands given in exchange, and for and in consideration of the provisions hereinbefore recited, and of the relinquishment by said tribe of all claims set up by or for them, for the difference in quantity of lands supposed by them to have been ceded in the treaty of the eighteenth of October, eighteen hundred and forty-eight, and what was actually ceded, the United States agree to pay said tribe the sum of two hundred and forty-two thousand six hundred and eighty-six dollars, in fifteen annual installments, commencing with the year 1867, each installment to be paid out and expended under the direction of the President of the United States, and for such objects, uses and purposes, as he shall judge necessary and proper for their wants, improvements and civilization.

30 Article 5. It is further agreed that all expense incurred in negotiating this treaty shall be paid by the United States.

Article 6. This treaty to be binding on the contracting parties as soon as it is ratified by the President and Senate of the United States, and assented to by Osh-kosh and Ke-she-nah, chiefs of said tribe.

Proclaimed August 2, 1854.

Which said treaty was thereafter ratified and was proclaimed on the 2d day of August, 1854.

XVI.

That by virtue of said treaty the United States attempted to grant to said Indians in exchange for the lands ceded them by the treaty of 1848 in the State of Minnesota, the following described tract of land, situated in the State of Wisconsin, to be held for a home as Indian lands are held, to-wit: That tract of country lying upon the Wolf River in the State of Wisconsin, commencing at the southeast corner of Township 28 North, of Range 16 East of the fourth principal meridian, running west 24 miles; thence north 18 miles; thence east 24 miles; thence south 18 miles to the place of beginning, the same being townships 28, 29 and 30 of Ranges 13, 14, 15 and 16, according to the public surveys, theretofore made.

XVII.

That the lands which are claimed by the State of Wisconsin and its grantees, and involved in this litigation, are sections 16 of each of said townships situated in the tract of land last above described, excepting only the sections 16 in Townships 28, ranges 13 and 14 east.

XVIII.

That the said township lines of said tract were duly surveyed by the United States in 1851 and '52, long prior to the treaty of May 12th, 1854, and its ratification, which occurred August 2d, 1854.

31

XIX.

That the section lines of said tract of land above set out were run by the United States in September, 1853, and June and July, 1854.

XX.

That by virtue of the surveys so made sections 16 of each of the townships in said tract so attempted to be given to the Indians by the treaty of 1854 were designated by public survey prior to the time said treaty was dated and ratified, and many of them were so designated before the date of said treaty.

XXI.

That the State of Wisconsin under and by virtue of this school grant as herein set out has at all times made claim to said school section of each of said townships as its own, basing such claim upon said school grant given it by the United States by virtue of the enabling act, an act admitting the State of Wisconsin into the Union.

XXII.

That thereafter the State of Wisconsin claimed ownership to said lands, conveyed a great many of said sections to persons who pur-

chased in good faith and who paid value therefore and relied upon the State's right to give them title and did accept, and the State gave, patents of the greater part of said section 16, situated within the limits of the tract attempted to be set apart for the Menomonee Indian Reservation.

XXIII.

That the State of Wisconsin is still the owner of two of said sections and claims title thereto.

XXIV.

That the State of Wisconsin sold the remaining sections 16 to innocent purchasers for value and accepted value therefor, and it is legally and in duty bound to defend and protect these purchasers and their title to said lands and would be liable to them for damages that they might sustain by reason of any failure of title.

XXV.

That the tract of land ceded by the Menomonee tribe of Indians by virtue of the treaty of date September 3d, 1836, ceded to the Government absolutely a large part of the present reservation, including that part known as towns 28, 29 and 30, of range 16 east.

XXVI.

That at the time of the treaty of the 18th of October, 1848, none of said Indians occupied any portion of said tract of land attempted to be set out as a reservation by the treaty of May 12th, 1854, and said tract was outside of the limits of the country known as the agricultural country provided by the treaty of February 8th, 1831.

XXVII.

That by virtue of the treaty of October 18, 1848, the said Menomonee Tribe of Indians, in consideration of other lands then and there ceded and Three Hundred and Fifty Thousand Dollars in cash thereafter duly paid, did cede to the United States all of the lands in the State of Wisconsin wherever situated, and it was agreed by Article 8 of said treaty of October 18th, 1848, as follows: "Article 8—It is agreed that the said Indians shall be permitted, if they so desire to do so, to remain on the lands hereby ceded for and during the period of two years from the date hereof, and until the President shall notify them that the same are wanted."

XXVIII.

That within two years from the date of said treaty, the President of the United States did notify the Menomonee Tribe of Indians that

said lands were wanted in accordance with the treaty of October 18th, 1848, and ordered their removal.

33

XXIX.

That thereafter and about August, 1850, said Menomonee Tribe of Indians petitioned the President of the United States to permit them to remain temporarily, a copy of which petition is hereto annexed and marked "Exhibit A" and made a part of this complaint. That thereafter the President of the United States, acting upon said petition, made an executive order, extending the time to remove until June 1st, 1851, and conditioned that no indulgence was granted by said order beyond that time and that the Indians do not interfere with the public surveys, a copy of which executive order is hereto annexed and made a part of this complaint, marked "Exhibit B." That said time was subsequently extended on like conditions by executive orders, as a matter of favor, to October 1st, 1852, in accordance with "Exhibits I and J," hereto attached and made a part of this complaint.

XXX.

That thereafter the lands around Lake Winnebago and Fox River, which were occupied by the said Indians, were wanted for public survey and were offered for sale, and thereupon the said Menomonee Indians were permitted to remove themselves temporarily to lands in and adjacent to the present reservation, which was done in 1853.

XXXI.

That the State of Wisconsin, by a resolution under date of Feb. 1st, 1853, attempted to give the assent of the State of Wisconsin to the said temporary occupancy by these Indians of the tract of land to which they so removed temporarily.

XXXII.

That at the time of the surveys of the township lines and some of the section lines, the said Indians did not occupy any portion of the present reservation, but in truth and in fact occupied the tract of land North of the Fox River and West of the Wolf, and particularly land around Lake Winneconne.

34

XXXIII.

That by virtue of the grant to the State of Wisconsin and the surveys, and the complete extinguishment of the Indian title by virtue of the treaty of October 18, 1848, and treaty of 1836, and by orders of the President herein referred to, the said sections 16 in each township of said reservation vested absolutely in the State of Wisconsin, free from any claim of the Indians or otherwise.

XXXIV.

That the State of Wisconsin and its grantees have claimed said lands for many years and some of the present owners of said lands have paid large prices for the same, and said tracts of lands have been sold and resold, and said grantees of the state have for many years paid taxes on said property, which said taxes have been received by the Counties of Wisconsin, and State of Wisconsin, without objection, after having been duly assessed to the said grantees as provided by the statutes of the State of Wisconsin.

XXXV.

That said tracts of land so embraced within sections 16 of said reservation are completely covered with valuable timber in a thrifty condition, which is young and growing and increasing in value each year, and it is not necessary to cut it to preserve the same.

XXXVI.

That the Menomonee Tribe of Indians have established a large saw-mill and wood-working plant at Neopit, within said reservation, and more particularly described as: "In Section 20 of Town 29 North, Range 14 East."

XXXVII.

That the said Indians have engaged in the manufacture of lumber and for several years past have cut between 20 and 30 million feet of timber, sawed it into lumber and exposed it for sale and
35 have sold it in the markets, and placed the funds received from same in the Menomonee Indian fund.

XXXVIII.

That the said Menomonee Tribe of Indians have several hundred million feet of timber, which is many times more than is necessary to provide them with fuel and timber for building purposes and more than sixty million feet have been cut and exposed for sale in the public markets.

XXXIX.

That the said tribe of Indians, under the advice and consent of the Secretary of the Interior, and under a claim of right, have unlawfully entered upon some of the tracts of lands owned by the State and its grantees, to-wit: Sections 16 in the townships within the limits of the Indian Reservation as attempted to be fixed by the treaty of May 12th, 1854, and have actually cut some, and have threatened to cut and now threaten to cut all the timber thereon and expose it for sale after it has been sawed into lumber at the said

Neopit mill, without intending or contemplating the improvement of said land thereafter for any other purpose.

XL.

That the said Menomonee Tribe of Indians claim the right to cut all of the timber on said sections regardless of kind, size and condition, and have actually cut great quantities of young, thrifty timber, and claim the right to cut it all, claiming that neither the State of Wisconsin nor its grantees have any claim whatever to said sections 16 or any part thereof, or to any of the timber growing thereon.

XLI.

That the said sections 16 are of great value on account of the timber thereon contained, and after said timber is cut the said lands would be of little or no value. That none of the Indians have ever lived on said sections.

36

XLII.

That said timber upon said sections is largely strong growing timber, which in the interest of good husbandry should be allowed to stand and will increase in value to the benefit of the owners.

XLIII.

That for many years prior to this cutting no claim was ever raised by the said Menomonee Tribe of Indians or the said Interior Department that the said State and its grantees did not own said school sections, but on the contrary many decisions from the Land Department expressly held that the Indians had at most only the right of occupancy and that the ultimate fee belonged to said State of Wisconsin and its grantees.

XLIV.

That under date of April 25, 1875, the Department of the Interior rendered the following decision, which is marked "Exhibit C" and made a part of this complaint, and under date of Dec. 6, 1880, the Land Department rendered the following decision, which is marked "Exhibit D" and made a part of this complaint, and which was in part based on a decision of the Office of Indian Affairs, dated Nov. 30, 1880, a copy of which is hereto attached, marked "Exhibit E" and made a part of this bill.

That hereto attached and marked "Exhibit F" is a copy of an opinion of the Department of the Interior, rendered in 1890.

That the State of Wisconsin always claimed and now claims, as the fact is, that the Indian title was extinguished under and by the treaty of 1848 above set forth, and that hereto attached, marked "Exhibit G," is a copy of a letter from the Governor of said State,

dated July 8th, 1852, to the Commissioner of the General Land Office, in said matter, which said letter is made a part hereof.

That the complainant has always claimed the sections sixteen in said reservations; that hereto annexed, marked "Exhibit II," hereby referred to and made a part hereof, is a copy of a letter dated Jan. 16th, 1873, from the Governor of Wisconsin, by his private secretary, to Hon. C. C. Washburn.

37

XLV.

That the State, relying upon these and other similar decisions, conveyed said lands to said purchasers for value and that some of said grantees in turn conveyed them to other innocent purchasers for value.

XLVI.

That about 1873 a controversy arose in the State of Wisconsin between Fanny Beecher and David Wetherby, relating to timber cut upon section 16 in Town 28 North, Range 14 East, which said controversy finally reached the Supreme Court of the United States and is known as the case of Beecher vs. Wetherby, reported in 95 U. S. Reports, on page 517.

XLVII.

That said decision was known throughout the State of Wisconsin and thereafter many of the grantees of the State of Wisconsin purchased from the State of Wisconsin, relying upon said authority and the rule of property therein announced.

XLVIII.

That the reservation in said case was a part of the identical reservation, which is the subject of this controversy, and the lands here were surveyed the same as in that case, with the exception that some of said townships in this controversy were subdivided in September, 1853.

XLIX.

That upwards of thirty years the Interior Department has recognized the case of Beecher vs. Wetherby as the authority relating to the rights of the State of Wisconsin, its grantees and the Menominee Indians, and has at all times so notified prospective buyers from the State of Wisconsin and the State of Wisconsin; and has knowingly permitted the State of Wisconsin and its grantees to deal with reference to these lands without objection, upon the express statement of the Interior Department that the greatest claim the Indians had was the claim of occupancy only.

L.

That the lands so in dispute between the plaintiff, State of Wisconsin, and the defendant, Franklin K. Lane, as Secretary of the Interior of the United States, acting for and in behalf of the said Indians, amount in the aggregate to about 6,400 acres and have a market value of over One Hundred Thousand Dollars (\$100,000). That by Chapter 95 of the Laws of the State of Wisconsin for the year 1903, approved April 20, 1903, the Attorney General of the State of Wisconsin was duly authorized to institute proceedings in this court under the provisions of the act of Congress passed March 2, 1901, and hereinbefore referred to, to determine the rights of said state to what was commonly known as school lands within any reservation or Indian cession within said state, where any Indian tribe claims any title to or interest in said lands, or to the disposition thereof by the United States.

LI.

That the Department of the Interior has further recognized the right of the grantees of the State of Wisconsin of said sections to the timber thereon, as will appear by the records on file in the office of the Commissioner of Indian Affairs and particularly by that transaction whereby the Interior Department paid to one Henry Sherry, a resident of Wisconsin, the sum of Twenty-five Thousand Dollars (\$25,000) or thereabouts for trespass committed by said Menomonee Tribe of Indians upon sections 16, in said reservation tract.

LII.

That the said transaction and said payment became widely known throughout the State of Wisconsin and many of the grantees of the State of Wisconsin purchased from said State of Wisconsin after said payment, with knowledge thereof, and relied upon said payment, decision of the Supreme Court of the United States in *Beecher vs. Wetherby*, and repeated rulings of the Land Department relative to these identical lands, when they so purchased said property.

39 That the proposed cutting by said Indians is unlawful.

That the cutting of said timber and the claim of right by said Secretary of the Interior and said Indians to cut said timber and their threatening to cut and remove the same, and their claim of title to said lands, and their present denial of the title and ownership thereof by the State of Wisconsin and its grantees, and their entering upon the same and cutting the timber thereon, all tend to cast a cloud upon the title of the State and its grantees, and to decrease the value of said lands, prevent the use, occupation, enjoyment and sale thereof by the State and its grantees and are a great damage to the State and its grantees in the sum of many thousands of dollars.

In consideration whereof, and for as much as your orator is remediless in the premises, and can have no adequate relief except in this

court; and to the end, therefore, that the defendant may, if he can, show why your orator should not have the relief prayed, and to the end that the defendant may make full, true, direct and perfect answer to the matters herebefore stated and charged, (but not under oath), answer under oath being expressly waived; and to the end that the title of your orator to the lands hereinbefore described and referred to may be established and freed from all cloud, and that the title to said lands be decreed to be in your orator, and those claiming under it, and to the end that the defendant, his officers, servants and employees, and the officers, servants and employees of the said Department, of which he is official head, be restrained by injunction, issuing out of this court, from in any manner interfering with said lands, and from committing waste thereon, and your orator prays that the defendant, his agents, servants and employees and officers, and the said Menomonce Indians be perpetually restrained from entering upon said tracts, and from cutting timber therefrom and destroying the value of said property, and from committing waste thereon, and from in any manner interfering with the use, possession or enjoyment of any part of said lands, or of interfering with the exercise by your orator, or its grantees, of acts of ownership of said lands.

May it please Your Honors to grant unto your orator not only a writ of injunction, conformably to the prayer of this bill, by
 40 a writ of subpoena issuing out of, and under the seal of this Honorable Court, directed to the defendant, Franklin K. Lane, Secretary of the Interior of the United States, commanding him under a certain penalty to be therein inserted, on a day certain, to be and appear and answer (but not under oath) to this bill of complaint; to further stand to and abide such order and decree as shall be made herein agreeably to equity and good conscience.

And your orator will ever pray.

WALTER C. OWEN,
Attorney General of Wisconsin.

J. C. THOMPSON,
 MICHAEL G. EBERLEIN,
 R. A. HOLLISTER,
Of Counsel for State of Wisconsin.

UNITED STATES OF AMERICA,
State of Wisconsin, County of Dane, ss:

Personally appeared before me the undersigned, Walter C. Owen, who being sworn in the foregoing cause, on oath says he is the Attorney General of the State of Wisconsin, and as such directed the filing of the foregoing bill. That all of the facts set forth in said bill are true to the best of his knowledge, information and belief.

WALTER C. OWEN.

Subscribed and sworn to before me this 28th day of March, A. D. 1913.

[SEAL.]

J. E. MESSERSCHMIDT,
Notary Public, Dane County, Wisconsin.

EXHIBIT "A."

To the President of the United States:

The undersigned chiefs and head-men, constituting a deputation from the Menomonee nation of Indians, who reside in the State of Wisconsin, and within the Superintendency of the Sub-agency of Green Bay, beg leave to lay the following statement before their great father, the President of the United States.

On the 18th day of October, 1848, the Menomonee Nation made a treaty, at Lake Pow-aw-hay-kow-nay, with Col. William Medill, a Commissioner on the part of the United States, which treaty was ratified by the Senate of the United States, on the 19th day of January, 1849. By the 2d Article of this treaty, they ceded to the United States "all their lands in the State of Wisconsin, wherever situated." By the 3rd Article, the United States, in consideration of this cession, agreed to give them, "for a home" where they should hereafter reside, "all that country or tract of land ceded to the said United States by the Chippewa Indians, of the Mississippi and Lake Superior, in the treaty of August 2, 1847, and the Pillager band of Chippewa Indians, in the treaty of August 21, 1847, which may not be assigned to the Winnebago Indians under the treaty with that tribe of October 13, 1846, and which is guaranteed to contain not less than six hundred thousand acres."

By the 4th article, the United States agreed to pay, "in further and full consideration of said cession," the sum of \$350,000.

By the 7th article they were permitted to remain on the land ceded by said treaty, and at their present homes, "during the period of two years from the date" of said treaty, or until the 18th day of October, 1850, "and until the President shall notify them that the same are wanted."

They have already been notified that the United States will expect them to remove to the new home set apart for them in this, according to the terms of said 7th article—that is, by the 18th of the approaching month of October.

They were told by the Commissioner, at the negotiation of this treaty, that if the country thus set apart for them on the west side of the Mississippi river, was not a good country and such as would furnish them with game and other means of subsistence, the United States would provide for them another, suitable to their condition and habits. With the view of ascertaining whether it was such a country, they have during the past season, sent a portion of their chiefs to look at and examine it, who have reported to their nation that it is not such a country as will furnish them with the necessary means of subsistence, and, especially, that it is very poorly supplied with such game as they have been accustomed to use for their winter supply. They have but little doubt that they would be subjected to great suffering if they were forced to occupy it;—and, especially, if they were required to remove to it, at the time fixed in the said treaty. They, therefore, pray their great father that he will

countermand the order for their removal during the present fall, and that the matter may be left open for future consideration, inasmuch, as they have other very important matters, growing out of the making of said treaty, to lay before their great father. It is important to them that these last named matters should be decided and finally disposed of before their removal,—for if they are not, the act of removal will give such force and validity to said treaty, that it may be thereafter employed as an argument why their grievances should not be redressed. Their great father will also see that the season is now so far advanced that if they are required to leave their present homes by the 18th of October, their removal will then take place almost in the dead of winter, which sets in very early in that northern climate, and at a time when they and especially their women and children, will be exposed to a great deal of suffering from cold. They are not willing to believe that their great father will subject them to this suffering, when it is not necessary that they shall remove now, and when their lands ceded by them in Wisconsin, cannot, at present, be brought into market.

If their great father shall grant their prayer, they hope to show him hereafter, in the most satisfactory manner, that they were imposed on by Col. Medill when he made said treaty, in a manner which they do not think their great father will approve.

He told them, in council, that they did not own more land in Wisconsin than from one and a half to two and a half millions of acres. He exhibited to them a map, which he said was made
43 at Washington, setting forth the boundaries of their lands and showing what he represented as the quantity owned by them. They also had a map of their country which was shown to him as containing the land set apart and recognized as theirs by their former treaties with the United States, but he refused to have anything to do with it, and persisted in his aforesaid representation of the quantity; denying that they had any title, whatsoever, beyond the lines laid down on his map.

He told the nation that he would not give them more than the \$350,000 for said land, and threatened them with the authority of the United States and its power to remove them at its pleasure, if they did not sign the said treaty.

He threatened to degrade those of their chiefs who opposed the treaty, if they did not consent to the terms which he proposed, and declared that, if they persisted in refusing to sign it, he would remove them and appoint other chiefs who would sign it. Thus he induced some of their chiefs to sign said treaty from fear, and because they supposed that the United States would force them off their lands, if they did not willingly sell and cede them.

He told them, expressly, that if they signed the treaty, and the country set apart for them on the west side of the Mississippi was not good and suitable for them, they should be removed to a better country somewhere else.

Although he professed to have the boundaries of all their land marked out on his map, yet he did not describe the land ceded in the treaty, by these bounds;—he made the treaty read so as to cede "all

their lands in the State of Wisconsin, wherever situated," so as to include what was marked off on their map as well as his. When he returned to Washington he represented to Congress, in his annual report for 1848-49, that he had purchased of them, by this treaty, a tract of country "containing 4,000,000 acres," which was nearly or quite twice as much as he represented to them what they owned.

The undersigned do not enter into detail of these matters, because it is not now necessary. They refer only to the foregoing facts to show that they have good and sufficient reason for asking that they may not now be required to remove. If their great father shall grant them this request, they think they can lay before him such disinterested evidence of the bad faith practised towards them by Col. Medill as will satisfy him, that some relief, beyond the terms of said treaty, should be granted their said nation.

They hope their great father will consider of their condition and grant their prayer, so that they can return home and assure their nation that he is their friend, and that he will not suffer his officers to impose upon them because they are red-men.

OSH-KOSH.	his X mark.
KEE-CHEE-NEW.	his X mark.
SHOW-ANNO-PENESSE.	his X mark.
LAMOTTE.	his X mark.
CORRON GLANDE.	his X mark.
WAW-KEE-CHE-UN.	his X mark.
SHO-NES-NIEN.	his X mark.
SAYE-TOKE.	his X mark.
CHES-QUE-TUM.	his X mark.

Done in presence of

JOHN B. JACOBS,

REV'D F. F. BONDUEL,

*Superintendent and Pastor of the Menomonic
School and Mission.*

HUCHEBULL KALDWELL. his X mark.

GEORGE COURI.

45

EXHIBIT "B".

WASHINGTON, Sept. 5, 1850.

To the Secretary of the Interior.

SIR: After a careful consideration of the application by the Menomonee Indians to be permitted to remain temporarily upon the lands in Wisconsin, ceded by them to the United States by Treaty, bearing date October 18, 1848, I perceive no objection to granting their request for a reasonable time; you will therefore inform them that they will be permitted to remain there until the 1st day of June

next, provided they do not interfere with any surveys which may be ordered, and they must not understand this as granting any indulgence beyond that time.

Your ob't Serv't,
(Signed.)

MILLARD FILLMORE.

EXHIBIT "C".

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C.,
28th April, 1875.

SIR: I have examined the appeal of the State of Wisconsin from your decision of May 20th, 1874, refusing to recognize the claim of the State to the swamp lands included in the Indian reservations created by the 2nd Article of the Treaty of Sept. 30, 1854. (10 Stat. 1109).

As I understand your statement, the lands included in said reservations were the property in fee simple of the United States, on the 28th day of Sept., 1850, the date of swamp land grant.

Wisconsin had been admitted into the Union as a State on the 29th day of May, 1848.

The grant of September 28th, 1850, was a present grant, and the State of Wisconsin acquired title to all the swamp lands in said tracts at that date.—*Railroad Company vs. Smith*, 9 Wall. 46 95, and that title could not be and was not divested by subsequent treaty of 1854.

I reverse your decision and herewith return the papers transmitted with your letter of July 8th, 1874.

Very respectfully,

W. H. SMITH,
Acting Secretary.

The Commissioner of the General Land Office.

EXHIBIT "D".

Refer in reply to this initial C.
Enclosure.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., Dec. 6th, 1880.

J. H. Waggoner, Esq., Department of Public Lands, Madison, Wis.

SIR: Referring to your letter of October 2nd last, and my partial reply thereto on the 8th of same month, I now enclose herewith, copy of a letter received from the Acting Commissioner of Indian Affairs, dated the 30th ult., relative to the status of Section 16 in Township 46 of Range 2 W., and Townships 43 and 47 N. of Range 3 W., State of Wisconsin, embraced in the La Pointe Indian Reserva-

tion, from which it will be seen, that the title of the Indians to the lands embraced in said Reservation is only that of occupancy, and that the fee to the 16th section referred to is in the State, subject to the right of occupancy by the said Indians.

Very respectfully,

J. A. WILLIAMSON,
Commissioners.

47

EXHIBIT "E".

Refer in reply to this initial L.
La Pointe
L1408-1880.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, D. C., Nov. 30, 1880.

Honorable Commissioner of the General Land Office.

SIR: This office is in receipt of your letter of October 8th instant, in which you state that you are in receipt of a letter from J. H. Waggoner, Chief Clerk of the Department of Public Lands, State of Wisconsin, dated October 2d ultimo, in which he requests to be informed relative to the title to and possession of Section 16 in Township 46 North, Range 2 West and Townships 46 and 47 North of Range 3 West, State of Wisconsin, and you request in view of the fact that said Townships are within the La Pointe Indian Reservation, to be furnished with a statement as to the character of the title of said Indians to said lands, whether the fee thereto is in the Indian or simply the right of occupancy.

In reply I have to state that the Supreme Court of the United States, in the case of *Beecher v. Wetherby* (5th Otto p. 526), held that "there can hardly be a doubt that Congress intended to 'vest in 'the State (Wisconsin) the fee to Section 16 in every township, 'subject, it is true, as in all other cases of grants of public lands to 'the existing occupancy of the Indians so long as that occupancy 'should continue.'"

By the treaty of October 4th, 1842, (V. 11, Stat. 591), the Chippewas of the Mississippi and Lake Superior ceded to the United States a large tract of country in the (now) State of Wisconsin and Michigan, embracing within its limits the present La Pointe Indian Reservation. Article 2 of the said treaty provides as follows:

48 "The Indians stipulate for the right of hunting on the ceded
"territory, with the other usual privileges of occupancy, until
"required to remove by the President of the United States, and the
"laws of the United States shall be continued in force, in respect to
"their trade and intercourse with the whites, until otherwise ordered
"by Congress."

It does not appear that the President ever found it necessary or practicable to remove certain bands of the Chippewas who continued to occupy the lands ceded by the treaty referred to, and when in-

1854, the treaty was made establishing, with others, the La Pointe Indian Reservation, (Stat. 10, 1109) they still retained the right of occupancy guaranteed them by the treaty of 1842.

This being the fact, and applying the rules laid down by the Supreme Court, it would appear that the fee to the 16th Section referred to is in the State, subject to the right of occupancy of the Indians.

Very respectfully,

E. M. MARBLE,
Acting Commissioner.

Larrabee.

EXHIBIT "F".

Henry Sherry.

I acknowledge the receipt of your communication of 29th ultimo, reporting action taken relative to timber on 16th sections in the Menomonee reservation, Wisconsin, and asking the decision of the Department as to what are the rights of the respective parties claiming adverse interests under the law and facts presented; and of your communication of 6th instant, transmitting communications of Messrs. Hooper and Hooper, attorneys for Mr. Henry Sherry, a claimant to certain lands within some of said sections.

In response thereto, I transmit herewith an opinion of the Assistant Attorney General for the Department of the Interior, to whom the matter was referred, in whose views I concur.

Judge Shields says:

49 Under the rulings in *Beecher vs. Wetherby*, it would seem to be clear that the fee simple to the school section, within the present Menomonee reservation, had passed from the United States to the State of Wisconsin, yet, being subject to the Indian right of occupancy, a right which has, in this instance, existed continuously from the discovery of the country to the present day, and a right which yet exists; in my opinion neither the State nor its assignee can in any manner interfere with the full enjoyment of that right. For the State's officers or its assignee to cut timber upon said sections, during the right of occupancy of the same by the Indians, would unquestionably be a curtailment of the full enjoyment of that right which the supreme court has said "is unlimited"; and consequently is a violation of law. *United States v. Cook*, supra, (P. 593). The cutting of timber upon said sections being illegal, in my opinion, it follows that the State's officers or its assignees can have no right to pass through the reservation for the purpose of committing said illegal act.

Opinion.

Assistant Attorney General Shields to the Secretary of the Interior,
November 10, 1890.

I have received by your reference, with a request for an opinion the questions presented, a letter and accompanying papers from the Commissioner of Indian Affairs relative to the school sections in towns 30, R. 15 and 16, within the Menomonee Indian reservation in the State of Wisconsin.

The Menomonee Indian reservation in Wisconsin was the first defined and bounded by treaty of August 19, 1825 (7 Stats. 272). By a second treaty of October 18, 1848 (9 Stats. 952), said Indians ceded to the United States all their lands in Wisconsin, other lands being set apart for them west of the Mississippi river. It was stipulated, however, in the eighth article of said treaty that they were to be permitted to remain on the ceded lands, and not desiring to leave them and go to the new reservations assigned them beyond the Mississippi by another treaty of May 12, 1854, (10 Stats. 1064), those

lands were ceded back to the United States, and in consideration of such cession and to give to the Indians the lands "Desired by the tribe and for the purpose of giving them the same for a permanent home", the present reservation was established and described as—

That tract of country lying upon the Wolf river in the State of Wisconsin, commencing at the southeast corner of township 28 North of range 16 east of the fourth principal meridian, running west twenty-four miles, thence north eighteen miles, thence east twenty-four miles, thence south eighteen miles, to the place of beginning—the same being townships 28-29-30 of ranges 13-14-15 and 16, according to the public surveys.

The townships and section referred to by the Commissioner of Indian Affairs are within this reservation as they were originally within this Indian country and within the first reservation established by the treaty of 1825, *supra*.

By section 7 of the act of August 6, 1846 (9 Stats. 56), to enable the people of the Territory of Wisconsin to form a State Government, it was provided:

That sections numbered sixteen in every township of the public lands in said State and where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of the schools.

Wisconsin was admitted into the Union by the act of May 29, 1848 (9 Stats. 233). In 1852 the township lines of the public surveys were extended over towns 30 R. 15 and 16 and nearly all of the lands ceded in the treaty of October, 1848, by the Menomonees to the United States. In July and August, 1853, said townships were sectioned and the plats of the surveys thereof were approved February 20, 1854; prior to the establishment of the present reservation by the treaty of May 12, 1854, *supra*.

By treaty of February 11, 1856 (11 Stats. 697), the Menomonee Indians ceded to the United States a tract of land, not to exceed two townships in extent, along the western part of their said reservation on its southern line, for the purpose of locating thereon the Stockbridge and Munsee Indians. By act of February 6, 1871 (16 Stats. 404), all of said last-mentioned two townships, except eighteen sections thereof, were directed to be sold and were subsequently sold.

51 Some time after 1873 one Beecher, who had purchased from the United States and received patent for section 16, T. 28, R. 14, part of the land sold under the last cited act, replevied from Wetherby certain logs cut by the latter on said section sixteen, which he claimed by purchase from the State as of its school lands. The case of *Beecher v. Wetherby* finally reached, and was decided by the United States Supreme Court (95 U. S. 517). It was there held that by the compact with the State the fee simple title to section sixteen in every township of the public lands, or the lands which might be embraced within those sections, which had not been sold or otherwise disposed of, passed to the State; that they were set apart from the public domain and withdrawn from any subsequent disposition, and all that remained for the United States to do in respect to the same was to identify the sections by appropriate surveys, if they had not been surveyed, and make proper transfer of title; but they could not be diverted from their appropriation to the State by any sale or disposition subsequent to the compact with the State, p. 524. Referring to the claim that the lands in controversy had been part of a prior reservation for the Indians, the court said that the right which the Indians had was only that of occupancy, and at the time the logs were cut the Indians had removed from the lands in controversy, and the act of February, 1871, *supra*, directing the sale of said lands should be held to apply only to those sections outside of the school sections in said township. It was decided, therefore, that the title of the State to the school section was superior to that of Beecher, claiming to have bought from the United States under the act of 1871, *supra*.

I understand from the letter of the Commissioner of Indian Affairs submitted to me, that the State of Wisconsin, having sold sections sixteen in towns 30, R. 15 and 16, to one Sherry, the latter claims the right of ingress and egress, through the Menomonee reservation, for the purpose of cutting and hauling timber from said sections sixteen. To this proposition the Indian Office objects, and you wish my opinion whether, under existing circumstances, in view of the decision in *Beecher v. Wetherby*, *supra*, Sherry has the right to cut and remove the timber from said sections.

52 There is a marked difference between the condition of the land in controversy in that case, and the land in the present case. There the Indians had abandoned possession of the land, and the United States officers, misapprehending the purport of the act of 1871, *supra*, had undertaken to sell the sixteenth section along with the other sections. In the present case, the Indians have never abandoned or been out of possession of the land, and are yet in pos-

session of the same. They were in possession of it when the country was first discovered. Their right to it was recognized by the first treaty in 1825. When, on October 18, 1848, after the admission of Wisconsin into the Union, they agreed to cede to the United States all of their lands within that State, it was expressly stipulated that they were to be permitted to remain in possession thereof until notified by the President to the contrary. They did remain in possession and never were notified by the President. On the contrary, the former treaty was virtually abrogated *pro tanto*, and a new treaty made whereby a portion of the ceded lands were secured to them for a permanent home, and they are yet in possession of the same. Therefore, the important element of abandonment which existed in the case of *Beecher v. Wetherby* is absent in this and we have instead a continuous occupancy.

The title by which the Indians possessed these lands is the only and original one by which a right to any portion of the public domain is recognized as residing in them. It was the titled by occupancy; and, in this case, it was specially guaranteed to them as before stated. Says the Supreme Court in *United States v. Cook* (19 Wall. 591), the right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy. The possession when abandoned by the Indians attaches itself to the fee without further grant.

This is repeated in *Beecher v. Wetherby* (p. 525) in somewhat different language. The court said:

The land thus recognized as belonging to the Menomonee tribe embraced the section in controversy in this case. Subsequently, in 1831, the same boundaries were again recognized. But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such consideration of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians.

And to the same effect is the opinion of the court in *Buttz v. Northern Pacific R. R.* (119 U. S. 55-56), where it was said:

The land in controversy and other lands in Dakota, through which the Northern Pacific Railroad was to be constructed, was within what is known as Indian country. At the time the act of July 2, 1864, was passed, the title of the Indian tribes was not extinguished. But that fact did not prevent the grant of Congress for operating to pass the fee of the land to the company. The fee was in the United States. The Indians had merely a right of occupancy, a right to use the land subject to the dominion and control

of the government. The grant conveyed the fee subject to this right of occupancy. The railroad company took the property with this incumbrance. The right of the Indians, it is true, could not be interfered with or determined except by the United States. No private individual could invade it, and the manner, time, and conditions of its extinguishment were matters solely for the consideration of the government, and are not open to contestation in the judicial tribunals.

These excerpts fully state the law applicable to the case under consideration and furnish the answer to the inquiries of the Commissioner of Indian Affairs. Under the rulings in *Beecher v. Wetherby*, it would seem to be clear that the fee simple to the school sections within the present Menomonee reservation, had passed from the United States to the State of Wisconsin, yet, being subject to the Indian right which yet exists; in my opinion, neither

the State nor its assignee can in any manner interfere with the full enjoyment of that right. For the State's officers or its assignee to cut timber upon said sections, during the right of occupancy of the same by the Indians, would unquestionably be a curtailment of the full enjoyment of that right which the Supreme Court has said "Is unlimited"; and consequently is a violation of law. *United States v. Cook*, *supra* (p. 593). The cutting of timber upon said sections being illegal, in my opinion, it follows that the State's officers or its assignees can have no right to pass through the reservation for the purpose of committing said illegal act.

Whilst the law as before stated is, in my opinion, clear, it may be observed that no great hardship is inflicted upon the State, by the protection extended over the occupation by the Indians of the school sections; inasmuch as, though the United States can do nothing to divest the fee simple title of the State of said sections, the State is empowered in such cases to select other lands in lieu of such occupied sections, which latter are thereby released from the state's right and title. The State can hardly be interested in getting the particular school sections, and a grant of equal quantity would seem to put it in as good condition as the other States which had received the benefit of this bounty. *Heydenfeldt v. Daney, etc.* (93 U. S. 634-8).

In the case of the State of Colorado (6 L. D. 412), where the question was as to the State's right to indemnify for school sections within an Indian reservation, which had been practically disposed of prior to the admission of the State into the Union, and where the school grant was substantially the same as that of Wisconsin, it was said (p. 418):

I think, however, the true theory of the school grant is this: That where the fee is in the United States at the date of the survey and the land is so encumbered that full and complete title and right to possession can not then vest in the State, the State may, if it so desires, elect to take equivalent lands in fulfillment of the compact or it may wait until the title and right of possession unite in the government, and then satisfy its grant by taking the lands specifically granted.

I think the rule thus stated is the true one and should be followed.

55 The matter is optional with the State, however, if it elects to take lieu lands, it abandons its claim to the designated section; if, on the other hand, it prefers to take the identical school section named in the grant, it must wait until it is disencumbered of the Indian occupation; and whilst so waiting it must in no wise interfere with the full enjoyment of that occupation by cutting timber, or otherwise, for the Indians are entitled to the use of the timber as an incident to their occupation. *United States v. Cook*, *supra* (593).

I have been unable to obtain a copy of the opinion in the case of *Sherry v. Gould*, stated in the papers sent me to have been decided in the United States Circuit Court for the Eastern District of Wisconsin. It has not been published in the Federal Reporter, which usually publishes all decisions of interest made in the different United States Circuit Courts, and no copy of said decision, though referred to by the attorneys of Sherry, was furnished the Indian Office. I am unable, therefore, to consider that decision in connection with my opinion as herein given. I assume, however, that the decision referred to followed the rulings of the United States Supreme Court in the cases cited and others in the same line. It would not, in that event, be in conflict with my views. If, on the contrary, said decision is not in harmony with those quoted, it should not be accepted either as authoritative or persuasive, and therefore would not have affected the conclusion arrived at.

Henry Sherry. Decisions of the Department of the Interior,
Vol. 12, Page 177.

EXHIBIT "G."

STATE OF WISCONSIN,

Executive Department:

MADISON, July 8th, 1852.

56 SIR: I have the honor herewith to transmit to your Department for the approval of the President of the United States, schedules of the lands selected under my direction, as a part of the lands granted, by an act of Congress entitled "An Act to grant a certain quantity of land to aid in the improvement of the Fox and Wisconsin Rivers and to connect the same by a canal in the Territory of Wisconsin." Approved August 8th, 1846. The same being the odd numbered sections heretofore embraced in the "Menominee Reservation", the Indian title to which has now become extinct.

Your early attention to the above is respectfully requested.

Respectfully,

Your obedient Servant,

LEONARD J. FARWELL,

Governor.

To the Hon. J. Butterfield, Commissioner of the General Land Office, Washington, D. C.

EXHIBIT "H."

STATE OF WISCONSIN,
Executive Department:

MADISON, Jan'y 16th, 1873.

Hon. C. C. Washburn, Washington, D. C.

DEAR SIR: I enclose three lists of swamp land selections which we ask to have approved to the State. These selections were made under authority from the General Land Office, and are shown to be swamp lands, by the maps and field notes of the public surveys. Though at present within the limits of the Indian Reservations, it is believed that these lands really belong to the State under the general Swamp Act of 1850, and that patent therefor should issue to the state upon the extinguishment of the Indian title. The selections embraced in these lists were once approved to the State, but the approval was subsequently revoked. We now ask to have them again approved, and an acknowledgment from the Land Dept. that the State is entitled to patents whenever the Indian title shall become extinct.

We also claim the 16th Section in each township within the Indian Reservations under the Act of Congress of Aug. 6th, 1846, and ask recognition of this claim.

There being quite a quantity of swamp land yet unselected, which properly enures to the State under the Act of 1850, we ask for authority from the General Land Office to select for approval, all swamp and overflowed lands in this state, shown to be such by the maps and field notes of the public surveys, not heretofore selected and approved.

We ask further, for indemnity, either in money or other lands, for all lands sold by the United States, which enured to the State under the Act of Congress before referred to.

In this connection I would refer to a letter from this Dept. to the Com'ss'r of the General Land Office, dated May 4, 1872, and to which no reply has yet been received.

Very respectfully,

CHAS. J. MARTIN,
Private Sec'y.

58

EXHIBIT "I."

DEPARTMENT OF THE INTERIOR,
OFFICE INDIAN AFFAIRS.
May 28th, 1851.

SIR: I have the honor to enclose copy of a letter from R. W. Thompson, Esqr., Attorney for the Menominees, requesting in their behalf permission for them to remain one year longer in the country they now occupy.

The time limited by the President for the removal of these Indians will expire on the first day of June ensuing, and as weighty reasons

exist why they should not be removed at that time, I recommend that an order be issued by the President permitting them to remain until the 1st day of June, 1852,—on the condition that they do not interfere with the Surveys and with the distinct understanding that this extension of time is an act of favor, and that they are still subject to removal at the discretion of the President.

Very respectfully,
Your Obed't Serv't,

L. LEA, *Commissioner*.

Hon. A. H. H. Stuart, Sec. of the Interior.

O. I. A.—Green Bay.

Comr. Indian Affairs, May 28th, 1851.

Enclosing copy of a letter from R. W. Thompson, Esq., Att'y for Menominees, requesting in their behalf, permission for them to remain one year longer in the country they now occupy.

Comr. also recommends that an order be issued by the President permitting them to remain until the 1st day of June, 1852, &c.

Recommended to the President for his approval.

ALEX. H. H. STUART.

May 29/51

Approved, May 29, 1851. File.
MILLARD FILLMORE.

(over.)

Rec'd. at Ind. Office May 30, 1851.

59

EXHIBIT "J."

DEPARTMENT OF THE INTERIOR,
OFFICE INDIAN AFFAIRS,
June 1st, 1852.

SIR: I have received a letter from R. W. Thompson, Esq., Attorney for the Menominee Indians, urging that the time for their removal be extended by the President until the 1st day of October next. The present unsettled condition of the business of these Indians, renders the extension necessary, and I therefore recommend that an order to that effect be immediately made.

Very respectfully,
Your Ob't Serv't,

L. LEA, *Commissioner*.

Hon. Alex. H. H. Stuart, Secretary of the Interior.

Ordered according to the recommendation, June 2d, 1852.
MILLARD FILLMORE.

Commr. Indian Affairs, June 1, 1852.

Has rec'd a letter from R. W. Thompson, Esq., Attor'y for Menominee Indians, urging that the time for their removal be extended to 1st October next.

Recommends that an order to that effect be immediately made.

Returned to the Com'r approved by the President —. (This word is illegible).

June 3d 1852

Rec'd June 2d, 1852.

Office Supreme Court U. S. Filed Apr. 21, 1913. James H. McKenney, Clerk.

And afterwards, to-wit, on the 21st day of April, A. D. 1913, order for appearance for the Complainant was filed in the words & figures following, viz.:

60

Order for Appearance.

Supreme Court of the United States, October Term, 1912.

No. 19, Orig'l.

THE STATE OF WISCONSIN, Complainant,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

The Clerk will enter my appearance as Counsel for the Complainant.

(Name)

J. C. THOMPSON.

(P. O. Address)

Oshkosh, Wisconsin.

NOTE.—Must be signed by a member of the Bar of the Supreme Court United States. Individual and not firm names must be signed.

(Endorsed:) Supreme Court U. S. October Term, 1912. Term No. 19, Original. Appearance for Compl't. Filed April 21, 1913.

And afterwards, to-wit, on the 23d day of April, A. D. 1913, a subpoena was issued to the Marshal for service on defendant.

61

And afterwards, to-wit, on the 26th day of April, A. D. 1913, subpoena & return were filed in words and figures following, viz.:

THE UNITED STATES OF AMERICA, ss:

The President of the United States to Franklin K. Lane, Secretary of the Interior, Greeting:

For certain causes offered before the Supreme Court of the United States, having jurisdiction in equity, you are hereby commanded that, laying all other matters aside and notwithstanding any excuse you be and appear before the said Supreme Court, holding jurisdiction in equity, on Monday, October 13th, 1913, at the City of Washington, in the District of Columbia, being the seat of the National Government of the United States, to answer unto a bill of complaint of The State of Wisconsin in the said Court exhibited against you.

Hereof you are not to fail at your peril.

Witness the Honorable Edward D. White, Chief Justice of the United States, at the City of Washington, the 23d day of April, A. D. 1913.

[SEAL.]

JAMES H. McKENNEY,

Clerk of the Supreme Court of the United States.

Came to my hand at my office 1:45 o'clock P. M. this 23d day of April, 1913, at the City of Washington.

J. M. WRIGHT,

Marshal Supreme Court U. S.

Came to my hand as aforesaid and for the purpose of executing this process I hereby deputize and authorize Frank K. Green to serve this subpoena and make due return thereof.

62 Witness my hand this 23d day of April, 1913, at the City of Washington.

J. M. WRIGHT,

Marshal Supreme Court U. S.

Came to my hand at the City of Washington this 26th day of April, 1913, and executed the 26th day of April, 1913, on Franklin K. Lane, Secretary of the Interior, by making known to him the contents hereof, exhibiting to him this process and delivering to him a copy of the same and a copy of the Bill of Complaint.

FRANK K. GREEN, *Deputy.*

Executed as certified by the endorsements hereon and return of same made this 26th day of April, 1913.

J. M. WRIGHT,

Marshal Supreme Court U. S.

(Endorsed:) Supreme Court U. S. October Term, 1912. Term No. 19. Original. The State of Wisconsin, Complainant, vs. Franklin K. Lane, Secretary of the Interior. Subpoena and Marshal's return thereon. Filed April 26th, 1913.

And afterwards, to-wit, on the 14th day of October, A. D. 1913, the following entry appears of record, viz.:

63

No. 10, Original.

THE STATE OF WISCONSIN, Complainant,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

On motion of Mr. Assistant Attorney General West, of counsel for the defendant, leave is hereby granted to file a motion to dismiss herein.

October 14, 1913.

And on the same day, to-wit, the 14th day of October, A. D. 1913, motion to dismiss the Bill of Complaint was filed, which motion is in the words & figures following, viz:

64 In the Supreme Court of the United States, October Term, 1912.

Original, No. 19. In Equity.

THE STATE OF WISCONSIN

v.

FRANKLIN K. LANE, Secretary of the Interior.

Motion to Dismiss Original Bill of Complaint.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States, Sitting in Equity:

Now comes Franklin K. Lane, Secretary of the Interior, defendant in the above-entitled cause, by his attorney, and moves to dismiss the bill of complaint herein filed.

And for cause he respectfully shows:

First. That the said complainant has not in and by its said bill of complaint shown any such claim of right, title, or interest whatsoever in or to the land, or any part thereof, mentioned or described in said bill of complaint, or any acts or things done or threatened by respondent, which entitles said complainant to the relief prayed for in said bill of complaint or any of said relief, or any relief whatsoever against the defendant.

65 Second. That said complainant has not, in and by said bill of complaint, made or stated such a case as does or ought to entitle it to any relief as is thereby sought and prayed for, from or against the defendant.

Third. That said bill of complaint does not contain any matter of equity whereon the court can ground a decree or give to complainant any relief against defendant.

Fourth. That it does not appear, on the face of the bill, that this court has any jurisdiction over the subject-matter of this action, or, at this time, to interfere with the administration by the defendant of said lands for the benefit of the Menominee Indians, in this, that said tribe or nation of Indians, as from the pleading appears, is and has been, and was at the time of the cession, in occupancy of said lands, and that with the consent of the complainant, and that said occupancy or right of occupancy and use of said lands has never been abandoned or terminated.

Wherefore the defendant humbly prays that the bill of complaint herein filed be dismissed, with his reasonable costs, and that he be permitted to go hence without day.

PRESTON C. WEST,
Assistant Attorney General,
Solicitor and Counsel for Defendant.

F. W. CLEMENTS,
First Assistant Attorney,
C. EDWARD WRIGHT,
Assistant Attorney, of Counsel.

Office Supreme Court U. S. Filed Oct. 14, 1913. James H. McKenney, Clerk.

And afterwards, to-wit, on the 3d day of November, A. D. 1913, notice of motion to dismiss was filed in words and figures following, viz:

In the Supreme Court of the United States, October Term, 1912.

Original, No. 19.

THE STATE OF WISCONSIN, Complainant,

vs.

The State of Wisconsin.

To Walter C. Owen, Attorney General of Wisconsin, Solicitor and Counsel for Complainant:

Take notice that the motion to dismiss original bill of complaint filed in the above-entitled cause will be for hearing on the eighth day of December, 1913.

PRESTON C. WEST,
Assistant Attorney General,
Solicitor and Counsel for Defendant.

Service of the foregoing notice together with copy of motion to dismiss bill of complaint on the 18th day of October, 1913, is hereby acknowledged.

J. C. THOMPSON,
Solicitor for Complainant.

(Endorsed:) Supreme Court U. S. October Term, 1913. Term No. 10, Original. The State of Wisconsin, Complainant, vs. Franklin K. Lane, Secretary of the Interior. Notice of motion to dismiss and proof of service of same. Filed November 3, 1913.

And afterwards towit on the 29th day of April, A. D. 1914, the following order for appearance for defendant was filed in words & figures following, viz:

68

Order for Appearance.

Supreme Court of the United States, October Term, 1913.

No. 10, Orig.

THE STATE OF WISCONSIN, Compl't,

vs.

FRANKLIN K. LANE, Sect'y of Interior.

The Clerk will enter my appearance as Counsel for the defendant.

(Name)

C. EDWARD WRIGHT,

(P. O. Address)

Interior Department.

NOTE.—Must be signed by a member of the Bar of the Supreme Court United States. Individual and not firm names must be signed.

(Endorsed:) Supreme Court U. S. October Term, 1913. Term No. 10, Orig'l. Appearance for Def't. Filed April 29, 1914.

And afterwards, towit, on the 1st day of February, A. D. 1915, motion to set cause for hearing was filed in words and figures following, viz:

69 In the Supreme Court of the United States, October Term,
1914.

Original, No. 9.

THE STATE OF WISCONSIN, Complainant,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

Motion to Set Cause for Hearing.

Comes now the defendant in the above-entitled action, by his attorneys, and respectfully represents to the Court that by leave duly granted he had filed his motion to dismiss plaintiff's bill of complaint; that in support thereof he has filed his brief and argument; that in opposition thereto, the plaintiff has filed its brief and argument; and that the cause is now ready for oral argument and submission.

That by stipulation hereto attached, entered into between the attorney for the plaintiff and the attorney for the defendant, it is suggested, if agreeable to court, that oral hearing on said motion to dismiss be set for Monday, the fifteenth day of March, 1915, at 12 o'clock noon or as soon thereafter as the same may be heard.

Wherefore the defendant hereby submits his said motion to dismiss and respectfully moves the court to set the same for argument on the date above mentioned.

FRANKLIN K. LANE,

Secretary of the Interior.

By His Attorneys, PRESTON C. WEST,

Solicitor for the Department of the Interior.

C. EDWARD WRIGHT,

Assistant Attorney for the Department

of the Interior.

70

(Endorsed:) Supreme Court, U. S. October Term, 1914. Term No. 9 Original, The State of Wisconsin, Complainant, vs. Franklin K. Lane, Secretary of the Interior. Motion and stipulation to set down motion to dismiss for argument. Filed February 1, 1915.

And afterwards, towit, on the 12th day of March, A. D. 1915, order for appearance for the Complainant was filed in words and figures following viz:

71

Order for Appearance.

Supreme Court of the United States, October Term, 1914.

No. 9, Orig'l.

THE STATE OF WISCONSIN, Complainant,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

The Clerk will enter my appearance as Counsel for the Complainant.

(Name)

R. A. HOLLIISTER,

(P. O. Address)

Oshkosh, Wis.

NOTE.—Must be signed by a member of the Bar of the Supreme Court United States. Individual and not firm names must be signed.

(Endorsed:) Supreme Court U. S. October Term, 1914. Term No. 9. Orig'l. Appearance for Complainant. Filed Mar. 12, 1915.

And afterwards, to-wit, on the 15th day of March, A. D. 1915, order for appearance for the Complainant was filed in words and figures following, viz.:

72

Order for Appearance.

Supreme Court of the United States, October Term, 1914.

No. 9, Orig.

THE STATE OF WISCONSIN, Complainant,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

The Clerk will enter my appearance as Counsel for the Complainant.

(Name)

WALTER DREW,

(P. O. Address)

Deputy Attorney General for Wis.
Madison, Wis.

NOTE.—Must be signed by a member of the Bar of the Supreme Court United States. Individual and not firm names must be signed.

(Endorsed:) Supreme Court U. S. October Term, 1914. Term No. 9. Orig'l. Appearance for Compl't. Filed March 15, 1915.

An on the same day, to-wit, the 15th day of March, A. D. 1915, the following entry appears of record, viz.:

73

9, Original.

THE STATE OF WISCONSIN, Complainant,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

The argument of the motion to dismiss in this cause was commenced by Mr. Preston C. West in support of the motion, and continued by Mr. John C. Thompson in opposition thereto.

March 15, 1915.

And afterwards, to-wit, on the 16th day of March, A. D. 1915, the following entry appears of record, viz.:

74

9, Original.

THE STATE OF WISCONSIN, Complainant,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

The argument of the motion to dismiss in this cause was continued by Mr. John C. Thompson and Mr. Michael Eberlein in opposition to the motion and concluded by Mr. Preston C. West in support of the same.

March 16, 1915.

And afterwards, to-wit, on the 22d day of March, A. D. 1915, the following entry appears of record, viz.:

75

Supreme Court of the United States, October Term, 1914.

No. 9, Original.

THE STATE OF WISCONSIN, Complainant,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

On consideration of the motion to dismiss herein,

It is now here ordered by the Court that the said motion be, and same is hereby, overruled without prejudice, and leave is given the defendant to answer within thirty days,

March 22, 1915.

And afterwards, to-wit, on the 20th day of April, A. D. 1915, the answer of the defendant was filed in words and figures following, viz.:

76 In the Supreme Court of the United States, October Term, 1914.

Original, No. 9. In Equity.

THE STATE OF WISCONSIN

v.

FRANKLIN K. LANE, Secretary of the Interior.

Defendant's Answer.

The defendant, now and at all times hereafter saving and reserving to himself all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's bill of complaint in the above-entitled cause, and especially saving and reserving all benefit and advantage from those matters and rights set forth in his motion to dismiss said bill of complaint, which said motion was overruled by this court on the 22d day of March, 1915, without prejudice and with leave to answer over, for answer thereunto or to so much or such parts of said bill as he is advised is material for him to make answer, answers and says:

1-3. He admits the averments of fact in Paragraphs I, II, and III of the bill.

77 4. He is advised, and therefore avers, that the allegations in the fourth paragraph contained amount to a conclusion of law which he need not answer.

5-6. He admits the allegations in Paragraphs V and VI in so far as they state the claimed boundaries of the Menominee country as it then existed and as it was defined in the treaty of 1831 set forth in said paragraph VI; but he denies that said Menominee tribe of Indians "occupied a small parcel of land situated in the State of Wisconsin, upon the shores of Winnebago Lake," if by that averment it is meant that said Indians occupied only a small part of their country and did not occupy the whole thereof.

7. He is advised and therefore avers that the allegations of Paragraph VII amount to a conclusion of law which he need not answer.

8. He admits the allegation of Paragraph VIII.

9-10. So far as Paragraphs IX and X contain averments of fact, he admits the same, but as to conclusions as to the legal effect and operation of the treaty therein referred to, he is advised that he need not answer.

11-12. He admits the averments of fact in Paragraphs XI and XII of the bill.

13. He admits the fact alleged in Paragraph XIII; that is, that

by the treaty therein referred to, the said tribe of Indians undertook to cede the lands described in said paragraph.

14-15. He admits the averments in Paragraphs XIV and XV.

78 16. In answer to the averments of Paragraph XVI, he says that, by the treaty therein referred to, the United States, with the acquiescence of the State of Wisconsin, although in law the latter was unnecessary, did create out of the lands theretofore held and occupied by said Indian tribe a tract with defined outboundaries as a reservation within which the Indian right of occupancy was to be confined, and that said tract embraced Townships 28, 29, and 30, Ranges 13, 14, 15, and 16 east.

17. He admits the allegations contained in Paragraph XVII.

18. He denies the allegations of Paragraph XVIII and states the facts to be that while the exterior township lines of township 30, range 13, and township 30, range 14, were run in 1851, the plats thereof were not approved by the surveyor general until February 6, 1855; that while the exterior township lines of township 28, range 13, township 30, range 15, and townships 28, 29, and 30, range 16, were run late in the fall of 1852, the plats thereof were not approved by the surveyor general until February and March, 1854; that while the exterior lines of township 29, range 13, were run in 1852 and 1853, the plat thereof was not approved by the surveyor general until October, 1854; that while the exterior lines of townships 28 and 29, range 14, were run late in the fall of 1852, the plats thereof were not approved by the surveyor general until October, 1854; and that the township lines of townships 28 and 29, range 15, were not run
79 until 1890 and 1891, and the plats thereof were not approved by the surveyor general until 1891.

19. He denies the averments of Paragraph XIX and states the facts to be as follows:

That the section lines of township 28, range 13, were run commencing October 15, 1853, and ending November 2, 1853, but that the plat of survey thereof was not approved and transmitted by the surveyor general until March 13, 1854, and was not approved by the Commissioner of the General Land Office until March 23, 1854;

That the section lines of township 29, range 13, were run commencing July 10, 1854, and ending July 31, 1854, but that the plat thereof was not approved and transmitted by the surveyor general until October 11, 1854, and was not approved by the Commissioner of the General Land Office until October 19, 1854;

That the section lines of township 30, range 13, were run commencing November 4, 1854, and ending November 21, 1854, but that the plat thereof was not approved and transmitted by the surveyor general until February 6, 1855, and was not approved by the Commissioner of the General Land Office until February 17, 1855;

That the section lines of township 28, range 14, were run commencing May 29, 1854, and ending June 16, 1854, and that the section lines of township 29, range 14, were run commencing June
80 17, 1854, and ending July 7, 1854, but that the plats of survey of said townships were not approved and transmitted by the surveyor general until October 11, 1854, and were not ap-

proved by the Commissioner of the General Land Office until October 19, 1854;

That the section lines of township 30, range 14, were run commencing October 16, 1854, and ending November 3, 1854, but the plat of survey thereof was not approved and transmitted by the surveyor general until February 6, 1855, and was not approved by the Commissioner of the General Land Office until February 17, 1855;

That the section lines of township 28, range 15, were run commencing December 29, 1890, and ending April 22, 1891, and that plat thereof was approved by the Commissioner of the General Land Office August 28, 1891;

That the section lines of township 29, range 15, were run commencing May 28, 1891, and ending July 2, 1891, and the plat thereof was approved by the Commissioner of the General Land Office on October 3, 1891;

That the section lines of township 30, range 15, were run commencing July 30, 1853, and ending September 10, 1853, but that the plat of survey thereof was not approved and transmitted by the surveyor general until February 20, 1854, and was not approved by the Commissioner of the General Land Office until March 11, 1854;

That the section lines of township 28, range 16, were run commencing July 3, 1853, and ending September 13, 1853, and of township 29, range 16, commencing July 13, 1853, and ending September 12, 1853; and of township 30, range 16, commencing July 21, 1853, and ending July 29, 1853; but that the plats of survey of these three townships were not approved and transmitted by the surveyor general until February 20, 1854, and were not approved by the Commissioner of the General Land Office until March 11, 1854.

20. He denies the averment of Paragraph XX.

21-22. He states that as to the averments of Paragraphs XXI and XXII he has no other information as to the claim, and the assertion thereof; of the State of Wisconsin, or as to the other facts alleged, than is in said paragraphs contained, and therefore is unable to admit or deny the same.

23. Answering the averment of Paragraph XXIII, he states that he has no information other than in said paragraph contained, and therefore can not admit the same, but demands strict proof thereof, and especially as to which particular two sections the plaintiff still claims title.

24. He says that as to the averment of fact in Paragraph XXIV of the bill he has no knowledge other than said paragraph contained, except as to such matters or claims concerning which he hereinafter admits knowledge in his answer to the averments of paragraph 45.

25-26. He denies the averments of Paragraphs XXV and XXVI, except that the tract ceded for a reservation by the treaty of May 12, 1854, was outside of what was known as the "agricultural country" of the Menominees.

27. He admits the averment in Paragraph XXVII.

28. He denies the averment in Paragraph XXVIII and states the fact to be that the President of the United States not only

did not within two years from the date of said treaty notify the Menominees to remove, but that he has never at any time so notified them.

29. He admits the averment of Paragraph XXIX.

30. Answering the allegations of Paragraph XXX he states the facts to be as follows: That said Indians, upon examination of the lands ceded them in Minnesota, found said lands not adaptable to their uses and purposes, and desired to remain within the State of Wisconsin; that under the authority contained in the treaty of 1848 the President of the United States permitted them to remain within said State, on the land ceded by them in said treaty of 1848; that to comply with the desire of said Indians, exploration of their country was undertaken and, the Indians being willing, it was decided to permit them to stay permanently upon that portion of their country lying on the Wolf and Oconto Rivers and being practically the same lands now within their reservation; that Congress having provided in August, 1852, in an appropriation act, the money for the removal of said Indians and their domestic effects, the said Indians were removed and located upon their present reservation in October, 1852.

31. He admits that on February 1, 1853, the State of Wisconsin, by joint resolution of its legislature, gave assent to the occupancy by the Menominee Indians of lands now within their reservation as defined by the treaty of May 12, 1854, but denies that said assent was qualified in any way, especially as to "temporary" occupancy; and, on the contrary, he states the fact to be that said assent was to the effect that said Indians might remain on the tract of land set apart for them so far as the same is now within the confines of the existing Menominee Indian Reservation, and on which said Menominee Tribe of Indians then resided; the said joint resolution being in words and figures as follows, to-wit:

That the assent of the State of Wisconsin is hereby given to the Menominee Nation of Indians to remain on the tracts of land set apart for them by the President of the United States on the Wolf and Oconto Rivers, and upon which they now reside, the same being within the State of Wisconsin aforesaid, and described as follows, to-wit: Commencing at the southeast corner of township 28 north, range 19, running thence west 30 miles, thence north 18 miles, thence east 30 miles, thence south 18 miles to the place of beginning. (General Laws, Wis., 1853, p. 110.)

32. He denies the allegations of Paragraph XXXII and states the fact to be that at all times prior and subsequent to the survey of said townships and said section lines, said lands were a part of the Menominee Indian country and were occupied by said Indian tribe, and are now so occupied.

33. He is advised that the averments of Paragraph XXXIII amount to a conclusion of law which he need not answer.

84 34. Answering the allegations of Paragraph XXXIV he says that he has no information other than in said paragraph contained and therefore can neither deny nor admit the same.

35. He admits the allegation of Paragraph XXXV, that the lands embraced in sections 16 of said reservation are covered with valuable

timber, but denies that it is increasing in value each year, and denies that it is not necessary to cut the timber growing on said tracts of land in order to preserve the same; and as to that he says he is advised and believes, and therefore avers that good husbandry and forestry require the judicious cutting of said timber.

36. He admits the averment in Paragraph XXXVI contained.

37. He admits the allegations of Paragraph XXXVII and states that said cutting and manufacturing of timber have been engaged in by said Menominee Indians pursuant to authorization and direction from time to time by acts of Congress.

38. He admits the allegation of Paragraph XXXVIII.

39. Answering Paragraph XXXIX, he states that it is true that in some instances prior to the filing of this suit, said Indians entered upon one of the sections numbered 16 and did cut and remove some timber therefrom, and that said cutting was done under a claim of right; but denies that it was not contemplated thereafter to improve said land for any other purpose.

40. He admits the averments of Paragraph XL, save that he denies that said Indians have actually cut great quantities
85 of young thrifty timber. He is informed and believes and therefore avers that the actual amount of timber cut on any section 16 is small in quantity, and only of mature timber and such as according to good husbandry and forestry should be cut.

41. Answering the averments of Paragraph XLI, he says that he has no information or knowledge upon which he can admit or deny the allegation that said sections 16 are of great value on account of the standing timber thereon and that the land is of little or no value after the removal of said timber; but he denies that none of the Indians has ever lived on said sections, stating the fact to be that said sections are and have been subject to the same occupancy by said Indians as the other sections within the Menominee Indian Reservation and that the same are held by them for a home the same as Indian lands are held.

42. Answering the allegations of Paragraph XLII, he states he is advised and believes and hence avers that such cutting as has been done or will be done has been and will be done in accordance with principles of good forestry.

43. Answering the averments of Paragraph XLIII, he states that the holding and attitude of the Interior Department respecting the relative rights and interests of the Indians and of the State of Wisconsin in the lands within the Menominee Indian Reservation are stated in the decision marked as Exhibit F of complainant's bill.

44. He admits the averments of fact in Paragraph XLIV, except
86 in so far as said paragraph attempts to state as a fact that the Indian title to the land involved in this suit was extinguished by the treaty of 1848, and he denies that the Indian title has ever at any time been extinguished to the lands involved in this suit.

45. He has no knowledge other than in Paragraph XLV contained as to conveyances of said lands by said State to purchasers or of conveyances by said alleged purchasers to others, except that the

records of the Bureau of Indian Affairs, as he is advised, shows that as early as 1888 one Henry Sherry claimed to be the owner of a part of section 16, T. 30 N., R. 16 E., within said Menominee Reservation, and that in 1898 the Oconto Lumber Company was likewise claiming to be the owner of a portion of said section, to which tract said company, on April 13, 1899, executed a quit claim deed to the United States for the benefit of the Menominee Indians, and that in 1899-1900 a firm or corporation known under the style of Hollister, Amos & Company were likewise claiming title to lands within the same section.

46. He admits the averment of Paragraph XLVI.

47. He has no knowledge save as in Paragraph XLVII contained as to matter therein averred and can not state on belief or otherwise whether the same be true.

48. Answering the averments of Paragraph XLVIII he states the facts to be that the township and sections within the reservation were surveyed and plats thereof approved on the dates hereinbefore

87 stated in paragraph 19 of this answer; that the land involved in the case of Beecher v. Wetherby, to-wit, section 16, township 28 north, range 14 east, was a part of two townships, to-wit, townships 28, ranges 13 and 14 east, ceded to the United States for the benefit of the Stockbridge and Munsee Indians by the treaty of February 11, 1856 (11 Stat., 697), and so far as said section 16 was concerned the Indian title had been thereafter and prior to 1871 wholly extinguished and the Indians had removed therefrom.

49. Answering the averments of Paragraph XLIX, he states that he has no knowledge other than in said paragraph contained as to any transaction between the State of Wisconsin and its alleged grantees or prospective purchasers from the State of Wisconsin beyond this, that in the case of Henry Sherry (plaintiff's Exhibit F) the right of cutting timber by the State or its grantees was denied and that, as he is advised that the records of the Bureau of Indian Affairs show, an arrangement was sanctioned in 1898 whereby the Menominee Indians cut and removed timber on sec. 16, T. 30, R. 16, claimed by the Oconto Lumber Company, for which the said Indians were paid by said lumber company, and in consideration whereof said company executed a quitclaim deed as set forth in Paragraph 45 of this answer, and that in 1899-1900 a similar authority was granted by the Interior Department for the logging of timber claimed by Hollister, Amos & Company, the parties named in Paragraph 45 of this answer, said timber being on a part of said sec. 16, T. 30, R. 16.

88 50. He admits the averments of Paragraph L, save that he has no information or knowledge of the market value of the lands claimed by the complainant except as in said paragraph contained.

51. He is informed that a search of the records of the Bureau of Indian Affairs fails to disclose any payment made to Henry Sherry, as averred in paragraph LI, or even of any claim for payment pre-

ferred by him or in his behalf, and on such information and belief he therefore denies the averment in said paragraph contained.

52. He has no knowledge on which to predicate an admission or a denial, save as in Paragraph LII contained, as to rumors or reports current in the State of Wisconsin or the effect thereof concerning the supposed transaction and payment referred to in said paragraph.

And now having fully answered, the defendant prays that the bill herein filed be dismissed with his reasonable costs and charges in this behalf sustained and that he be permitted to go hence without day.

FRANKLIN K. LANE,

Secretary of the Interior.

By His Attorneys, PRESTON C. WEST,

Solicitor for the Department of the Interior.

C. EDWARD WRIGHT,

Assistant Attorney for the Department of the Interior.

Office Supreme Court, U. S. Filed Apr. 20, 1915. James D. Maher, Clerk.

And afterwards, to-wit, on the 1st day of June, A. D. 1915, the following entry appears of record, viz:

89

9, Original.

THE STATE OF WISCONSIN, Complainant,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

On motion of Mr. R. A. Hollister, of counsel for the Complainant, leave is hereby granted to file replication in this cause.

June 1, 1915.

Which said Replication is in words & figures following, viz:

90

The Replication of the State of Wisconsin.

In the Supreme Court of the United States, October Term, 1914.
Original, No. 9. In Equity.

THE STATE OF WISCONSIN

vs.

FRANKLIN K. LANE, Secretary of the Interior.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States, Sitting in Equity:

The replication of the above named complainant to the answer of the above named defendant:

This replicant, saving and reserving the question of the necessity of a replication herein and saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendant, for replication thereunto, sayeth, that it does and will ever maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by said defendant and that the answer of said defendant is very uncertain, evasive and
91 insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in said answer contained material or effectual in the law to be replied unto, confessed, or avoided, traversed, or denied, is true; all of which matters and things this replicant is ready to aver, maintain, and prove as this Honorable Court shall direct, and humbly as in and by its said bill it has already prayed.

WALTER C. OWEN,
Attorney General of Wisconsin,
Solicitor for the State of Wisconsin.

J. C. THOMPSON,
MICHAEL G. EBERLEIN,
R. A. HOLLISTER,
Of Counsel.

Office Supreme Court, U. S. Filed June 1, 1915. James D. Maher, Clerk.

And afterwards, to-wit, on the 13th day of December, A. D. 1915, the following entry appears of record, viz:

92

9, Original.

THE STATE OF WISCONSIN, Complainant,

VS.

FRANKLIN K. LANE, Secretary of the Interior.

Mr. C. Edward Wright, of counsel for the defendant, submitted to the consideration of the Court a joint motion for the appointment of a commissioner and for the fixing of time for taking the testimony in this cause.

December 13, 1915.

Which said motion is in words & figures following, viz:

93

In the Supreme Court of the United States, October Term, 1915.

Original, No. 9. In Equity.

STATE OF WISCONSIN,

VS.

FRANKLIN K. LANE, Secretary of the Interior.

Motion for the Appointment of a Commissioner and Fixing Time for the Taking of Testimony.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Come now the parties in the above-entitled cause by their counsel and move the court as follows:

First. That this court appoint William C. Kimball, of Oshkosh, Wis., a commissioner to take the testimony in this case and to report the same to the court without findings of fact or conclusions of law; that the commissioner shall be allowed not to exceed \$10 per diem for his compensation, together with his actual traveling and reasonable hotel expenses, an itemized statement of which shall be submitted to the court in his final report; that he shall report to

94 the court a stenographic copy of the testimony taken before him; that payment of compensation and expenses be made in such manner as the court may direct.

Second. That the plaintiff may take testimony at such place as its counsel may indicate between the 1st day of February, 1916, and the 1st day of April, 1916, upon giving 10 days' notice of the time and place of taking testimony to the counsel for the defendant.

Third. That the defendant may take testimony at such place as his counsel may indicate between the 1st day of February, 1916, and

the 1st day of June, 1916, upon giving 10 days' notice of the time and place of taking such testimony to the counsel for the plaintiff herein.

Fourth. That the plaintiff may take testimony in rebuttal between the 1st day of June, 1916, and the 1st day of July, 1916, at such time and place as its counsel may indicate upon giving 10 days' notice to counsel for defendant.

Fifth. The defendant shall then conclude the taking of any further testimony on or before September 1, 1916, upon giving ten days' notice of the time and place of taking such testimony to the counsel for the plaintiff.

Sixth. That the above set forth times designated for taking testimony may be varied upon consent of counsel for the respective parties, which shall have the same effect as an order made by this court when entered upon the record before the commissioner; but the time for concluding the testimony shall not be extended without the further order of this court.

WALTER C. OWEN,
Attorney General for Wisconsin.

J. C. THOMPSON,

M. G. EBERLEIN,

R. A. HOLLISTER,

For the Plaintiff.

PRESTON C. WEST,

Solicitor for the Department of the Interior.

C. EDWARD WRIGHT,

Assistant Attorney for the Defendant.

Office Supreme Court, U. S. Filed Dec. 13, 1915. James D. Maher, Clerk.

And afterwards, to-wit, the 20th day of December, A. D. 1915, the following entry appears of record, viz.:

Supreme Court of the United States, October Term, 1915.

9, Original.

THE STATE OF WISCONSIN, Complainant,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

On consideration of the motion for the appointment of a Commissioner to take the testimony in this case and to fix the time for taking said testimony,

It is now here ordered by the Court that William C. Kimball, of Oshkosh, Wisconsin, be, and he is hereby appointed Commissioner to take the testimony in this case and to report the same to the court

without findings of fact or conclusions of law; that he be allowed not to exceed Ten Dollars (\$10.00) per diem for his compensation, together with his actual travelling and reasonable hotel expenses, an itemized statement of which shall be submitted to the court in his final report; that he shall report to the court a stenographic copy of the testimony taken before him, and that payment of his compensation and expenses be made hereafter in such manner as the court may direct.

It is further ordered that the complainant may take testimony at such place as its counsel may indicate between the 1st day of February, 1916, and the 1st day of April, 1916, upon giving ten days notice of the time and place of taking such testimony to counsel for the defendant; that the defendant may take testimony at such place as his counsel may indicate between the first day of February, 1916, and the 1st day of June, 1916, upon giving 10 days' notice of the time and place of taking such testimony to the counsel for the complainant herein; that the complainant may take testimony in rebuttal between the 1st day of June, 1916, and the 1st day of July, 1916, at such time and place as its counsel may indicate upon giving 10 days' notice to counsel for defendant; the defendant shall then conclude the taking of any further testimony on or before September 1, 1916, upon giving ten days' notice of the time and place of taking such testimony to the counsel for the complainant; that the above set forth times designated for taking testimony may be varied upon consent of counsel for the respective parties, which shall have the same effect as an order made by this court when entered upon the record before the commissioner; but the time for concluding the testimony shall not be extended without the further order of this court.

December 20, 1915.

And afterwards, to-wit, on the 20th day of November, A. D. 1916, a motion to file, open & publish testimony was filed in words & figures following, viz.:

98 In the Supreme Court of the United States, October Term, 1915.

No. 9, Original.

THE STATE OF WISCONSIN, Complainant,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

The State of Wisconsin, complainant, and Franklin K. Lane, Secretary of the Interior, now move the court to file open and publish the reports of W. C. Kimball, Esq., Special Commissioner herein, as to the taking of testimony, the testimony and the exhibits

offered in evidence, the stipulation of counsel, and the Commissioner's report as to his expenses.

WALTER C. OWEN,
*Attorney General of Wisconsin,
 Solicitor for the State of Wisconsin.*
 C. EDWARD WRIGHT,
*Assistant Attorney for the
 Interior Department and
 Solicitor for the Department.*

(Endorsed:) Supreme Court U. S. October Term, 1916. Term No. 9. Original. State of Wisconsin, Complainant, vs. Franklin K. Lane, Secretary of the Interior. Motion to file, open and publish Commissioner's report and evidence. Filed November 20, 1916.

And on the same day, to-wit, the 20th day of November, A. D. 1916, the following entry appears of record, viz.:

99

9, Original.

THE STATE OF WISCONSIN, Complainant,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

On motion of Mr. C. Edward Wright, of counsel for the defendant, leave is hereby granted to file the report of the Commissioner and to open and publish the testimony in this cause,

November 20, 1916.

And afterwards, to-wit, on the 12th day of February A. D. 1917, a stipulation as to parts of testimony & exhibits to be printed was filed, in words & figures following, viz:

100 Supreme Court of the United States, October Term, 1916.

Original No. 9.

THE STATE OF WISCONSIN, Complainant,

vs.

FRANKLIN K. LANE, Secretary of the Interior, Defendant.

It is hereby stipulated and agreed, That only the following designated parts of the testimony and Exhibits in the above entitled case shall be printed, to-wit:

Print pages 1 to 187, both numbers inclusive, (the page numbers hereby referred to being at the bottom of pages made by the Commissioner taking the testimony) of the testimony.

Print pages 189 to page 221, both numbers inclusive.

Print pages 222 to 237 inclusive.

Print Commissioner's certificate as to Exhibits.

Do not print Exhibit No. 1.

Do not print Exhibit 2 which was read into the record at page 88.

Print Exhibit 3.

Do not print Exhibit 4.

Print Exhibit 5.

Print Exhibit 6.

Do not print Exhibits 7 to 34, but in lieu thereof, print the following statement:

"Exhibits 7 to 34 are tax receipts for taxes paid by Hayter and Humphrey, to the Treasurer of the Town of Richmond upon Section 16-29-14 covering a period from 1887 to 1912."

Do not print Complainant's Exhibits 35 to 40, but in lieu thereof print the following statement:

101 Complainant's Exhibits 35 to 40 are original receipts from the State of Wisconsin on the Hayter and Humphrey land, including payments from 1884 to 1886."

Do not print Complainant's Exhibit No. 41, but print in lieu thereof the following statement:

"Complainant's Exhibit No. 41 is a supposed photographic copy of Silas Chapman's map of 1855 purporting to show the Menominee Reservation, and either party may refer to said copy of the Exhibit as it appears in the record, or to the original copy which was retained by the witness, Nicholson, the Indian Agent of the Reservation."

Do not print Complainant's Exhibits 42 to 49, but in lieu thereof print the following statement:

"Complainant's Exhibits 42 to 49 inclusive, are abstracts of title to lands in the different Sections 16 in the Menominee Reservation, showing some contracts for the sale of, and patents of the lands covered from the State of Wisconsin to divers individuals, and covering the following descriptions:

Description	Section	Town	Range	Sold by State.
N.W. $\frac{1}{4}$ of N.W. $\frac{1}{4}$	16	28	16	Jan. 21, 1886
N.W. $\frac{1}{4}$ of S.W. $\frac{1}{4}$	16	29	16	do
N.E. $\frac{1}{4}$ of N.E. $\frac{1}{4}$ and lot 3. .	16	28	16	1900
W. $\frac{1}{2}$ of N.E. $\frac{1}{4}$	13	28	16	Jan. 21, 1887
S.E. $\frac{1}{4}$ of N.E. $\frac{1}{4}$	16	28	16	do
N.E. $\frac{1}{4}$ of N.E. $\frac{1}{4}$	16	28	16	"
S. $\frac{1}{2}$ of N.W. $\frac{1}{4}$	16	28	16	Dec. 13, 1888
Lots 1, 2 and 4	16	28	16	Jan. 21, 1887
N.E. $\frac{1}{4}$ of S.W. $\frac{1}{4}$	16	29	16	do
S. $\frac{1}{2}$ of	16	29	16	1887-1888
S.E. $\frac{1}{4}$ of	16	29	16	1887-1888

102 All of Section 16 Township 29 North, Range 14 E. Pat. 1895-1901.

All of Section 16 Township 30 North, Range 14 E. Pat. 1903.

All of Section 16 Township 30 North, Range 13 E. Pat. 1885-1887.

All of Section 16 Township 29 North, Range 13 E. Pat. 1885.

All of Section 16 Township 30 North, Range 15 E. Pat. 1879-1897."

Do not print Complainant's Exhibit 50, the same having been read into the record at page 90.

Do not print Complainant's Exhibit 51, the same having been read into the record at page 97.

Do not print Complainant's Exhibit 52.

Do not print Complainant's Exhibit 53, but in lieu thereof print the following statement:

Complainant's Exhibit 53 is the Complaint or Declaration, Answer and Judgment in the case of Henry Sherry vs. James P. Gould, commenced in Circuit Court, Oconto County, and tried and concluded in the Circuit Court of the United States for the Eastern District of Wisconsin, wherein Sherry sued Gould for the value of 500,000 feet of pine logs cut on section 16 Township 30, Range 16 East, of which land Sherry claimed to be the owner in fee, and the Defendant answering through W. A. Walker, Attorney in defense, set out that the land was in the Menominee Indian Reservation, and that all of said timber was cut under the authority of the United States and its officers and sold by the United States to the Defendant, and denying Complainant's title on information. Judgment dated February 10th, 1890, was for the Complainant for the recovery of the value of the timber taken with costs.

Do not print Complainant's Exhibit 54, the same having been read into the record at page 116.

Do not print Complainant's Exhibit 55, the same having been read into the record at page 115. (363)

193 Do not print Complainant's Exhibits 56 to 66, inclusive, but in lieu thereof, print the following:

Complainant's Exhibits Nos. 56 to 66 are certified copies of Township Plats.

"Complainant's Exhibit 56 is a certified copy of the Township Plat of Township No. 30 North, Range 16 East, Fourth Meridian, showing the survey thereof as follows:

Rec'd. with Sur. Gen'l. letter of Feb. 20, 1854.

Total number of acres 23,724.87.

Surveys designated.	By whom surveyed.	Date of contract.	Amount of surveys.	When surveyed.	When pd. & chd. on the Sur'r Gen.
S. & W. Township lines.....	Wm. J. Neeley....	Aug. 3d, 1852..	M. chs. lks. 12 12 44	Oct. & Nov., 1852.	
Subdivisions	Nelson Fletcher..	June 15, 1853..	59 30 26	July, 1853.	
E. Township line	Thomas Sprague..	Apr. 29, 1839..	5 79 90	June, 1839.	
N. 3rd Correction line boundary.....	James M. Marsh..	May 16, 1851..	6 16 18	June, 1851.	

The above map of Township No. 30 Range No. 16 East of the 4th Principal Meridian of Wisconsin is strictly conformable to the field notes of the survey thereof on file in this office which have been examined and approved.

WARNER LEWIS, Sur'r Gen'l.

Surveyor General Office, Dubuque, Feb'y 20th, 1854.

Exhibit No. 57, Township No. 29 N. Range No. 16 East 4th Mer.

Received with Sur'r Gen'l's letter Feb. 20, 1854.

Total number of acres 23,556.87.

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Surveys designated.	By whom surveyed.	Date of contract.	Amount of surveys.	When surveyed.	When pd. for and chd. in the Sur'r Gen'l act.
S. W. & N. Township lines.....	Wm. J. Neeley....	Aug. 3d, 1852..	M. chs. lks. 18 17 98	Oct. & Nov., 1852.	
Subdivisions	Nelson Fletcher..	June 15, 1853..	64 14 29	July & Sept., 1853.	
E. Township lines.....	Thomas Sprague..	Apr. 29, 1839..	5 79 70	June, 1839.	

The above map of Township No. 29 North of Range No. 16, East of the 4th Principal Meridian State of Wisconsin is strictly conformable to the field notes of the survey thereof on file in this office which have been examined and approved.

WARNER LEWIS, Sur'r Gen'l.

Surveyor General Office, Dubuque, Feb'y 20th, 1854.

Exhibit No. 58, Township No. 28, Range, No. 16, East 4th Mer.
Rec'd with Sur. Gen'l letter of Feb. 20, 1854. H. M.
Total number of Acres 22,144.57.

5—9

Surveys designated.	By whom surveyed.	Date of contract.	Amount of surveys.	When surveyed.	When pd. for and chd. on the Sur'r Gen'l ac't.
W. & N. Township lines.....	Wm. J. Neeley....	Aug. 3, 1852....	M. chs. lks. 12 05 27	Oct., 1852.	
Subdivisions	Nelson Fletcher...	June 15, 1853..	76 28 05	July & Sept., 1853.	
S. Township line.....	T. Conkey	Jan'y 31, 1845..	6 00 00	May, 1845.	
E. Township line.....	A. G. Ellis.....	July 21, 1845..	6 03 84	Dec., 1845.	

The above Map of Township No. 28 North Range No. 16 East of the 4th Principal Meridian State of Wisconsin strictly conformable to the field notes of the survey thereof on file in this office which have been examined and approved.

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WARNER LEWIS, *Sur'r Gen'l.*

Surveyor General's Office, Dubuque, Feb'y 20th, 1854.

Exhibit No. 59, Township No. 30, N. Range No. 15 East 4th Meridian. Rec'd with Sur. Gen'l letter of Feb. 20, 1854.
Total number of Acres, 23,251.94.

Surveys designated.	By whom surveyed.	Date of contract.	Amount of surveys.	When surveyed.	When pd. for & chd. in the Sur'r. Gen. ac't.
S. W. & E. Township.....	Wm. J. Neeley....	Aug. 3d, 1852..	M. chs. lks. 18 18 77	Nov., 1852.	
Subdivisions	Nelson Fletcher...	June 15, 1853..	81 61 85	Jul., Aug., & Sept., 1853.	
N. 3d Boundary Correction line.....	James M. Marsh..	May 10, 1851..	6 15 08	June, 1851.	

The above Map of Township No. 30, North of Range No. 15, East of the 4th Principal Meridian State of Wisconsin, is strictly conformable to the field notes of the survey thereof on file in this office, which have been examined and approved.

Surveyor General's Office, Dubuque, Feb'y 20th, 1854.

WARNER LEWIS, *Sur'r Gen'l.*

Exhibit No. 60, Township No. 29, N. Range No. 14, East, 4th Mer. Rec'd with letter of October 11/59.
Total number of acres 23,233.73.

Surveys designated.	By whom surveyed.	Date of contract.	Amount of surveys.	When surveyed.	When chd. in the Sur't Gen'l ac't.
Township lines	Wm. J. Neeley....	August 3, 1852.	M. chs. lks.		
Subdivisions	James Withrow ..	June 28, 1853..	24 10 23	Oct. & Nov., 1852	
			60 20 30	June & Jul., 1854.	

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The above map of Township No. 29 North of Range No. 14 East 4th Principal Meridian, Wisconsin, is strictly conformable to the field notes of the survey thereof on file in this office which have been examined and approved.

WARNER LEWIS, *Sur'r Gen'l.*

Surveyor General's Office, Dubuque, Oct. 11, 1854.

The Tp. is within the Menominee Indian Reservation treaty May 12, 1854. Vol. 10, p. 1065.
Exhibit No. 61, Township No. 30, N. Range, No. 13, East of the 4th Mer. rec'd with letter of Feb'y 6th, 1885.
Total number of acres 23,282.59.

Surveys designated.	By whom surveyed.	Date of contract.	Amount of surveys.	When surveyed.	When chd. in the Sur't Gen'l ac't.
E. W. & S. Township lines.....	James M. Marsh..	May 10, 1851..	M. chs. lks.		
3d Corner "	W. J. Neeley.....	Aug. 3d, 1852..	5 74 98	June, 1851.	
N. Subdivisions	James Withrow ..	Sept. 4, 1854..	18 21 31	May, 1853.	
			60 27 77	Nov., 1854.	

The above map of Township No. 30, N. of Range No. 13, East of the 4th Principal Meridian State of Wisconsin, is strictly conformable to the field notes of the survey thereof on file in this office which have been examined and approved.

WARNER LEWIS, *Sur'r Gen'l.*

Surveyor General's Office, Dubuque, Feb'y 6th, 1855.

Exhibits Nos. 62 and 63 township No. 28 N. Range No. 15 E. 4th Principal Meridian.
Total number of Acres 23,079.95.

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Surveys designated.	By whom surveyed.	Date of contract.	Amount of surveys. M. chs. lks.	When surveyed.	Mean declination.
Township lines	Willis T. Richard-son	Oct. 30, 1890..	24 16 16	Dec. 9 to 27, 1890.	40 07' East.
Subdivisions	Willis T. Richard-son	" " "	60 32 36	Dec. 29, 1890, to Apr. 22, 1891.	
Sub-subdivisions	Willis T. Richard-son	" " "	100 60 15	Apr. 23 to May 19, 1891.	
Meanders	Willis T. Richard-son	" " "	19 10 30	May 20 to May 27, 1891.	

The above map of township No. 28 N. of Range No. 15 E. 4th Principal Meridian. Wisconsin, is strictly conformable to the field notes of the surveys thereof on file in this office which have been examined and approved.

THOMAS H. CARTER.

Commissioner Gen'l Land Office.

Office of the Commissioner Gen'l Land Office, Washington, D. C., August 28, 1891.

Exhibit No. 64, Township No. 29 N. Range No. 15 E. 4th Principal Meridian.
Total number of Acres 23,080.43.

Surveys designated.	By whom surveyed.	Date of contract.	Amount of surveys. M. chs. lks.	When surveyed.
Township lines	Willis T. Richard-son	Oct. 30, 1890..	18 3 62	May 28, 1891, to June 17, 1891.
Subdivisions	Willis T. Richard-son	" " "	60 29 4	May 28, 1891, to July 3, 1891.
Sub-subdivisions	Willis T. Richard-son	" " "	103 8 51	Aug. 11, 1891.
Meanders	Willis T. Richard-son	" " "	18 16 10	Aug. 12, 1891, to Aug. 17, 1891.

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The above map of Township No. 29, N. of Range No. 15 E. 4th Principal Meridian, Wisconsin, is strictly conformable to the field notes of the survey thereof on file in this office which have been examined and approved.

THOMAS H. CARTER,
Commissioner Gen'l Land Office.

Office Commissioner General Land Office, Washington, D. C.

Exhibit No. 65, Township No. 30, N. Range No. 14, East of the 4th Mer. Rec'd with letter of Feb. 6, 1855. H. M.

Total number of acres 25,527.66.

Surveys designated.	By whom surveyed.	Date of contract.	Amount of surveys.		When surveyed.	When chd. in the S. Gen'l ac't.
			M. chs.	lks.		
3rd Cor. line N. Township lines.....	Jas. M. Marsh.....	May 10th 1851.	6	00	90	June, 1851.
E. W. & S. Township lines.....	W. J. Keely.....	Aug. 3rd, 1852.	18	15	24	Nov., 1852.
Subdivisions	James Withrow ..	Sept. 4th, 1854.	60	34	71	Oct. & Nov., 1854.

The above map of township No. 30 North of Range No. 14 East of the 4th Principal Meridian, State of Wisconsin, is strictly conformable to the field notes of the survey thereof, on file in this office, which have been examined and approved.
Surveyor General's Office, Dubuque, Feb'y 6th, 1855.

WARNER LEWIS, *Sur'r Gen'l.*

Exhibit No. 66 Township No. 29 N. Range No. 13, East Mer. Rec'd with letter of Oct. 11/54.

Total number of Acres	Surveys designated.	By whom surveyed.	Date of contract.	Amount of surveys.		When surveyed.	When pd. for & chd. in the Sur. Gen. ac't.
				M. chs.	lks.		
Township lines	Wm. J. Neely.....	Aug. 3rd, 1852.	23	79	95	Oct., 1852, & May, 1853.
Subdivisions	James Withrow...	June 28, 1853..	50	77	22	July, 1854.

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The above map of Township No. 29, North of Range No. 13 East of the 4th Principal Meridian, Wisconsin, is strictly conformable to the field notes of the survey thereof on file in this office, which have been examined and approved.
Surveyor General's Office, Dubuque, October 11th, 1854.

WARNER LEWIS, *Sur'r Gen'l.*

Do not print Exhibit 67, but print the statement: "Complainant's Exhibit 67 is a blue print on a part of the State of Wisconsin, including the Menominee Indian Reservation."

Do not print Complainant's Exhibits 68 and 69, but in lieu thereof print the following Statement:

"Complainant's Exhibit 68 is a copy of the map marked 'Map 1', attached to the brief and argument in support of Defendant's motion to dismiss the original bill of Complainant in this case."

"Complainant's Exhibit 69 is map of the reservation attached to the same brief as is Exhibit 68."

Do not print Complainant's Exhibit 70, the same having been read into the record at page 119.

Do not print Complainant's Exhibit 71, the same having been read into the record, and a certified copy filed as Complainant's Exhibit 112.

Do not print Complainant's Exhibit 72, a certified copy having been offered as Complainant's Exhibit 113.

Do not print Complainant's Exhibit 73, a certified copy 110 having been offered as Complainant's Exhibit 114.

Do not print Complainant's Exhibit 74, but in lieu thereof print the following statement:

"Complainant's Exhibit 74 is abstract of title of Section 16, Township 30, Range 16 East, showing a school Land patent thereof from the State of Wisconsin to George Farnsworth, dated August 29th, 1866, together with divers subsequent conveyances and tax deeds thereon."

Said Exhibit also shows that on April 18th, 1900, the then owners conveyed by warranty deed to the United States, the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$: N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$: S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$: S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$: N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$: S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$.

And under date of April 13th, 1899, the then owner conveyed to the United States, N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$: S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$: S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$: N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$: N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, and N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$.

Do not print Complainant's Exhibit 76, which was read into the record at page 150.

Do not print Complainant's Exhibit 77, which was read into the record at page 155.

Do not print Complainant's Exhibit 78, which was a Railroad Map of Wisconsin.

Print Complainant's Exhibit 79 to 111.

Do not print Complainant's Exhibit 112, but in lieu thereof print the following statement:

"Exhibit 112 is a certified copy of pages 252, 253, 306, 307, 349 and 350 of Vol. No. 2 of a record of 'Educational and other land grants' on file in the office of the Commissioner of Public Lands of Wisconsin."

This Exhibit is supposed to show the dates on which the different subdivisions of the School Lands were contracted 111 or patented by the State and the names of the grantees.

It is stipulated that either party may print in its brief such

portions thereof as it may deem material, and either party may refer to the Exhibit on the argument."

Print Complainant's Exhibit 113.

Print Complainant's Exhibit 114.

Print Complainant's Exhibit 115.

Do not again print Complainant's Exhibit 116 to 129, except as the same are contained in the testimony heretofore stipulated to be printed.

Print Defendant's Exhibit 1.

Do not print Defendant's Exhibit 2, but in lieu thereof print the following statement:

"Defendant's Exhibit 2 is impressions of the butts of 18 logs on cardboard, together with data written on said cardboards as follows:

Hemlock #1,	Sec. 16, T. 29, N. R. 14 E
Htc. St. 27,	
D. O. B. 28,	
Age, 211 years.	
Hemlock #2,	Sec. 16, T. 29, N. R. 14 E
Ht. St. 25,	
D. O. B. 18½,	
Age, 200 years.	
Hemlock #3,	Sec. 16, T. 29, N. R. 14 E
Ht. St. 23,	
D. O. B. 22½,	
Age, 234 years.	
Hemlock #4,	Sec. 16, T. 29, N. R. 14 E
Ht. St. 31,	
112 D. O. B. 12,	
Age, 154 years.	
Hemlock #5,	Sec. 16, T. 29, N. R. 14 E
Ht. St. 21,	
D. O. B. 19,	
Age, 208 years.	
Hemlock #6,	Sec. 16, T. 29, N. R. 14 E
Ht. St. 24,	
D. O. B. 20,	
Age, 212 years.	
Hemlock #7,	Sec. 16, T. 29, N. R. 14 E
Ht. St. 22,	
D. O. B. 18,	
Age, 203 years.	
Hemlock #8,	
Ht. St. 27,	
D. O. B. 25,	
Age, 202 years.	
Hemlock #9,	Sec. 16, T. 29, N. R. 14 E
Ht. St. 24,	
D. O. B. 23,	
Age, 215.	
Hemlock #10,	Sec. 16, T. 29, N. R. 14 E
Ht. St. 25,	

D. O. B. 23,
Age, 231 years.
Hemlock #11,
Ht. St. 25,
D. O. B. 10,

Age, 190 years.
113 Hemlock #12,
Ht. St. 27,

Sec. 16, T. 29, N. R. 14 E

D. O. B. 30,
Age, 238 years.
Hemlock #13,
Ht. St. 28,

Sec. 16, T. 29, N. R. 14 E

D. O. B. 24,
Age, 227 years.
Hemlock #14,
Ht. St. 25,

Sec. 16, T. 29, N. R. 14 E

D. O. B. 29,
Age, 224 years.
Hemlock #15,
Ht. St. 26,

Sec. 16, T. 29, N. R. 14 E

D. O. B. 20½,
Age, 234 years.
Hemlock #16,
Ht. St. 25,

Sec. 16, T. 29, N. R. 14 E

D. O. B. 29,
Age, 242 years.
Hemlock #17,
Ht. St. 33,

Sec. 16, T. 29, N. R. 14 E

D. O. B. 19,
Age, 263 years.
Hemlock #1,
Ht. St. 27,

Sec. 16, T. 29, N. R. 14 E

D. O. B. 28,
Age, 211 years.

114 Do not print Defendant's Exhibit 3, but in lieu thereof
print the following statement:

"Defendant's Exhibit 3 consists of ten sheets containing outlines of the different Sections 16 in the Indian Reservation with tabulated estimates of the different kinds and amounts of timber thereon and with additional notes as to character of soil, surface, etc.

These exhibits were objected to by Complainant as to such data, notes and memoranda.

It is stipulated that either party may refer to the same in its brief or argument subject to the objections made to such part thereof as may appear in the record at the time of the offering thereof."

Do not print Defendant's Exhibits 4, 5, and 6, but in lieu thereof print the following statement:

"Defendant's Exhibits 4, 5 and 6 are annual printed reports of the Commissioner of Public Lands of Wisconsin offered in evidence and in the record, from which it is understood either party may quote

in their briefs with proper reference to the pages of the printed reports."

Do not print Defendant's Exhibit "A," which was read into the record at page 190.

Do not print Defendant's Exhibit "B," which was read into the record at page 194.

Print Defendant's Exhibit "C."

Print Defendant's Exhibit "D" to "I," both inclusive.

Print Defendant's Exhibit "J."

It is Further Stipulated and Agreed, That the signature of any witness or witnesses to their testimony as reported by the Commissioner, be and the same hereby is waived, if any signing was necessary, and that the same may and shall be considered as signed.

115

WALTER C. OWEN,
*Attorney General of Wisconsin, Solicitor
for the State of Wisconsin, and*
M. G. EBERLEIN,
By J. C. THOMPSON &
R. A. HOLLISTER, AND
J. C. THOMPSON AND
R. A. HOLLISTER,
Solicitors for Complainant.
CHARLES D. MAHAFFIE,
C. EDWARD WRIGHT,
*Solicitors for Defendant, Franklin K.
Lane, Secretary of the Interior.*

(Endorsed:) Supreme Court of the United States. The State of Wisconsin, Complainant, vs. Franklin K. Lane, Secretary of the Interior, Defendant. Stipulation as to printing record. Office of the Clerk received Feb. 12, 1917, Supreme Court U. S.

(Endorsed:) Supreme Court U. S., October Term, 1916. Term No. 9. Original. The State of Wisconsin, Complainant, vs. Franklin K. Lane, Secretary of the Interior. Stipulation as to parts of testimony and exhibits to be printed. Filed February 12, 1917.

116 In the Supreme Court of the United States, October Term, 1915.

No. 9, Original. In Equity.

STATE OF WISCONSIN, Complainant,

vs.

FRANKLIN K. LANE, Secretary of the Interior, Defendant.

Notice of Taking Testimony.

Notice is hereby given that the complainant, the State of Wisconsin, will take testimony in the above-entitled suit before William

C. Kimball, Commissioner appointed to take testimony in this case, commencing at 10:00 o'clock a. m. on Friday the 24th day of March, 1916, at the Court House (being the Court House where the terms of the Circuit Court of Shawano County are held) in the City of Shawano, County of Shawano, and State of Wisconsin, and continuing on the 25th and 27th days of March, 1916, or at such times and places as the same may be then adjourned to; and

Notice is further given that ~~the~~testimony will be taken by the complainant before said William C. Kimball, Commissioner in the above-entitled suit, at the Court House (being the Court House where the terms of the Circuit Court of Winnebago County are held) in the City of Oshkosh, County of Winnebago, and State of Wisconsin, commencing at 10:00 o'clock a. m. on the 28th day of March, A. D. 1916, and at such other times and places as the same may be then adjourned to; and

Notice is further given that the complainant will take testimony in the above-entitled suit before said William C. Kimball, Commissioner, at the office of the Commissioners of Public Lands (being the office of the Land Department of the State of Wisconsin),
117 in the State Capitol building of the State of Wisconsin, in the City of Madison, County of Dane, and State of Wisconsin, commencing at 10:30 o'clock a. m. on the 30th day of March, A. D. 1916, and at such other times and places as the same may be then adjourned to, all pursuant to and in accordance with the order heretofore entered by the Supreme Court of the United States under date of December 20th, 1915.

Dated this 9th day of March, A. D. 1916.

WALTER C. OWEN,
Attorney General of Wisconsin
and Solicitor for the Complainant.

M. G. EBERLEIN,
R. A. HOLLISTER AND
J. C. THOMPSON,
Of Counsel for the State of Wisconsin.

To Preston C. West, Assistant Attorney General and Solicitor for the Defendant, and

To C. Edward Wright, Assistant Attorney for the Department of the Interior and of Counsel for Defendant.

(Endorsed:) In the Supreme Court of the United States, No. 9, Original October Term, 1915. The State of Wisconsin, Complainant, vs. Franklin K. Lane, Secretary of the Interior. Notice of taking testimony. Original. Walter C. Owen, Attorney General of Wisconsin, and solicitor for complainant. Personal service of the within notice admitted this 11th day of March, 1916. Solicitor for the defendant. C. Edward Wright, of counsel for defendant.

118 Supreme Court of the United States, October Term, 1915.

No. 9, Original.

STATE OF WISCONSIN, Complainant,

vs.

FRANKLIN K. LANE, Secretary of the Interior, Defendant,

Testimony Taken Before William C. Kimball, Commissioner.

Appearances:

For the complainant, Walter C. Owen, Attorney General State of Wisconsin; John C. Thompson, R. A. Hollister and M. G. Eberlein.

For the defendant, A. T. Vogelsang, Solicitor Interior Department; C. E. Wright and Villard Martin, Attorneys.

The complainant called DEWEY H. GEORGE, who being duly sworn, testified as follows:

Direct examination by Mr. Eberlein:

Q. You- name is Dewey George?

A. Yes, sir.

Q. You live in the City of Shawano?

A. Yes, sir.

Q. How long have you lived in the City of Shawano and in the vicinity of the City of Shawano?

A. Well, I think I have lived in the City of Shawano about 32 years, 31 or 32.

Q. What is your business?

A. Lumbering.

Q. For how many years were you engaged in lumbering.

A. Practically all my life except seven or eight years I spent in Iowa; started in when I was about 15 years old.

119 Q. At one time you were Indian Agent of the Menominee Indian Reservation.

A. I was.

Q. For how many years did you act in that capacity.

A. Five years.

Q. Can you give the dates.

A. I went on there October 1st, 1897, and left there October 1st, 1902, I think.

Q. During the time you were Indian Agent the question as the school sections on this reservation were often up for consideration.

A. Yes sir.

Q. And a good deal of matter affecting those sections passed through your office at that time.

A. Yes sir.

Q. You were familiar and are now familiar with the attitude of the Indian Office at Washington with reference to the right of the State and the United States to these sections.

Defendant objected as incompetent, irrelevant and immaterial.

A. I am familiar with the conditions during the time that I was agent.

Q. During that time you received many letters from the Commissioner of Indian Affairs setting out the claim of the State and the United States to these sections.

Defendant objected for the same reasons as above.

A. Why I received letters from the department making rulings with reference to school sections there during the time I was there.

Defendant moved the answer be stricken out on the ground that the letters received would be the best evidence.

120 Q. Those letters are not now in your possession.

A. They are not.

Q. They were left in the files at the agency when you left the office.

A. They were.

Q. Do you remember in particular certain correspondence had with the department at Washington when you offered to enter into a contract with the Indians for logging the so-called school sections.

Defendant objected as incompetent, irrelevant and immaterial and not the best evidence.

Q. Do you remember such correspondence.

A. I do.

Q. You have not now in your possession the letters received from the Commissioner of Indian Affairs relative to that matter.

A. I have not.

Q. They were left in the files at Keshena.

A. They were.

Q. And at what time as near as you can fix the date did you receive those letters from the department at Washington relative to those school sections, as near as you can fix the date.

A. I think that was along about November, possibly December of the fall of 1897.

By Mr. Eberlein: We now ask the Government to produce that certain letter written by the Commissioner of Indian Affairs to Dewey H. George, under the date of about November 1897 wherein the Commissioner of Indian Affairs instructed the agent at Kenhena to refrain from cutting any timber upon school sections 16 and from letting any contract thereof. We ask the production of this

121 letter so in case it is not produced we have laid our foundation for secondary evidence of the contents of that correspondence.

Have you the letter there, Mr. Nicholson?

By Mr. Nicholson: I have not had time to search the files and I didn't know such a letter was wanted. The subpoena was served

on me about 10 or 11 o'clock yesterday morning and we worked from that time until quarter of nine this morning over the files filed away in the vault downstairs and it was impossible to get every letter, and not knowing exactly what was wanted I packed up the letters referring to Sec. 16. I have not had time to know what those letters are.

Q. Do you suppose you could find such a letter if such a letter was written to Mr. George at that time.

A. It is possible if I had time.

Q. Have you the subpoena that was served on you in this case.

A. Yes sir, that is it.

Mr. Martin: Were you furnished with any other means of ascertaining just what correspondence this complainant wanted in this case besides this subpoena.

A. I was, I had a letter from the Commissioner of Indian Affairs.

Q. Did the Commissioner of Indian Affairs specify any more definitely than this subpoena.

A. No sir.

Q. When did you receive this subpoena.

A. 11 o'clock yesterday morning.

Q. And you have made an exhaustive search of the files since that time as you could.

A. I have yes.

Q. When did you receive the letter from the Commissioner of Indian Affairs.

122 A. About noon.

Q. And you have brought with you such correspondence as you have been able to find?

A. I have.

Q. Do you know whether the letter referred to by counsel is in your files?

A. I do not.

By Mr. Martin: If this letter can be found we will produce it and reserve the right to make such objection to its introduction as may be proper at that time.

Mr. George:

Q. Just what were the instructions that you received in that letter from the Commissioner of Indian Affairs?

Defendant objected as incompetent, irrelevant and immaterial, not the best evidence and for the further reason that a sufficient foundation for the introduction of this evidence has not been laid.

A. Well, the Indians had asked to be allowed to bank the timber on these sections 16 and I had written in a letter asking that they be allowed to bank that timber this winter of 1897-98, and during that correspondence I had a letter from the Office under no circumstances was I to allow the Indians to bank the timber on the sixteenth sections of the reservation. I couldn't remember all the letter but that was the purport of the letter; that is the last letter that I had in con-

nection with this correspondence; there was two or three letters back and forth.

Q. While you were acting as Indian Agent up there what effort if any did the Government make to cut the timber on these school sections?

Defendant objected as incompetent, irrelevant and immaterial. 123

A. I don't know that the Government made any efforts to cut the timber.

Q. Were any contracts let by the United States for the cutting of any timber upon these school sections outside of the contracts entered into by the Oconto Company and Hollister Amos Co.?

A. One more, one I think with Mr. Zachow of Shawano for two forties.

Q. And in those three instances named the grantees cut the timber?

Defendant objected as not the best evidence.

Q. They cut the timber?

A. That timber was banked and delivered to the parties who held title to the sections.

Q. Title from whom?

A. I suppose title from the State. They claimed to hold title to it; I didn't examine the title. It was banked under instructions from the Commissioner of Indian Affairs. There was a contract entered into with the Commissioner of Indian Affairs and I was instructed to enter into a contract with the Indians to bank it and deliver it to these certain people at a certain price per thousand feet.

Q. The Indians received a certain price for the cutting and banking of the timber?

A. Yes, sir.

Defendant objected to the question as leading, for the further reason that it appears that the cutting of the timber was in accordance with the contracts and the contracts have not been produced, nor their absence accounted for and the evidence offered is therefore not the best evidence.

By Mr. Eberlein: We now ask the United States to produce the three original contracts entered into between the United States and the Oconto Lumber Co., between the United States and Hollister Amos Co., between the United States and W. T. Zachow, relative to the cutting of timber upon school sections 16 in Town 30, Range. 16. 124

By Mr. Martin: The defendant now produces a contract with the Oconto Company mentioned by the attorney and states that exhaustive search of the records of the Indian Office fails to disclose any contract with Hollister Amos Co., and no request appears to have been heretofore given the defendant with reference to a contract with Mr. Zachow and it is unable to produce the same at this time.

It may be stated however that if the original contracts called for by the gentleman are found in the records at any subsequent time the same may be offered in the event that now oral testimony is taken as to their contents. The defendant does not decline to produce the contracts mentioned but has simply been unable to do so, for one reason on account of the notice the defendants received and for the further reason of the files has failed to disclose the contract with Hollister Amos & Co.

Complainant offered in evidence the notice to produce served upon the attorney for the defendant in this action with the admission of service.

By Mr. Eberlein: Mr. Nicholson has also been requested to produce those contracts from the files of the agency at Keshena and we will inquire whether he has them here?

By Mr. Nicholson: Those contracts were never sent to the Agency.

By Mr. Eberlein: Your office never had them?

My Mr. Nicholson: They never had them.

Mr. George:

Q. We have here the original contracts entered into between Oconto Co. and the United States, Ex. 2, and ask you 125 whether you have ever seen that before.

A. Why I suppose I have. I saw the contract at the time I was Agent. I suppose it is the same contract.

Q. Will you examine that and satisfy yourself as to the price received.

A. Yes, that is the contract.

Q. You will notice that that contract provides for the payment to the Indians of \$5.50, for cutting and banking these logs.

A. I do, yes, sir.

Q. Was that price in fact paid Mr. George.

A. It was paid to the Indians for banking.

Q. This contract is similar to other contracts excepting in price entered into by the United States *which* the Indians in the logging of their own lands.

A. No, that contract is not.

Q. What I mean, Mr. George, the Indians in this instance were given the right to cut and bank these logs in the same manner that were given other United States contracts in cutting their own timber.

A. The cutting was to be done under the same rules and regulations that they banked the Government timber in their annual contract.

Q. In this instance each head of a family was allowed a certain number of logs to put in.

A. The adult members of the tribe *was* allowed a pro rata share of the logs banked each year.

Q. They were each allowed to do their pro rata amount of cutting.

A. No that is not the idea; there was so many million feet; it ran

from thirteen to twenty million feet to be banked each year; now every adult member of the tribe was entitled to his pro rata share of the amount, total amount of feet banked. He had a right to take his share of the price by the Government.

Q. He got his pro rata share of the cost of the work of cutting and banking; he didn't get a pro rata share of the proceeds of the timber.

A. He simply entered into a contract, after dividing this amount that would be banked pro rata among the different members of the tribe then that man was entitled to a contract and received a certain price per thousand for banking that timber, that is all he received.

Q. In other words each one could go on the lands picked out and put in his share of the timber at a certain price per thousand feet if he wanted to.

A. That was the rule.

Q. The Indians who received these small contracts sold their rights to other Indian loggers.

A. Many of them did.

Q. And these Indian loggers after they had picked up a certain number of contracts would put in the aggregate of all those contracts as required by the United States.

A. The Indians who bought the contracts, whenever they bought a contract they came to the office and there was a memorandum kept in a book in the office, and this contract was credited to the man and then when it came time to log the man that did the logging took a contract covering all these small contracts at the price paid by the Government for the banking.

Q. Just what did these Indians who logged this receive in the way of compensation, a certain price.

A. They received a certain price per thousand for banking the logs.

Q. What if anything did they receive for stumpage.

A. Nothing.

127 Q. Who received the stumpage value of the United States lands.

A. That was turned over to the Government and went into a fund for the tribal account.

Q. In the Oconto Company contract marked Ex. No. 2, the Indians cut and banked these logs under your supervision the same as they would have done under a strictly Government contract.

A. Under the same rules and regulations that they did the Government logging.

Q. Who received the stumpage value for the logs cut upon this sec. 16, under the Oconto Contract.

A. The Oconto Company received the logs.

Q. And paid nothing.

A. They paid for the banking, there was no stumpage received by the Government for the Indians.

Complainant offered in evidence Ex. No. 2.

Defendant objected as immaterial and irrelevant,

Q. One of the conditions of this contract required the Oconto Company after receiving the timber to convey to the United States by deed their remaining interest in this school section. I will not ask you whether that condition was complied with.

A. It was.

Q. Mr. George, we have been unable to produce the original contracts entered into with the Hollister Amos Co., and Zachow about that same time or a little later and will ask you whether you know contracts in some form were in fact entered into with Hollister Amos and Company and W. T. Zachow for the cutting of timber on section 16 of the same town and range.

128 Defendant objects as incompetent, irrelevant and immaterial, not the best evidence, no foundation for the evidence having been laid.

A. The year after the Oconto Company logged I was instructed by the Commissioner of Indian Affairs to enter into a contract with Hollister and Zachow to bank their logs under the same conditions as those that were banked for the Oconto Company.

Q. Did the Hollister Amos people and Zachow in fact cut their timber under such contract.

A. It was cut by the Indians and banked and delivered to them.

Q. Separate contracts were entered into with the Hollister Amos People and W. T. Zachow.

A. I couldn't say positive now whether those contracts were forwarded from the Indian Office to the Agency here or not, I think they were.

Q. What I mean they were separate contracts.

A. They were separate contracts.

Q. One had nothing to do with the other.

A. No.

Q. In the contract with the Hollister-Amos people, do you remember that the price paid for the cutting and banking to the Indians was the same price paid under the Oconto Company contract.

A. My recollection is it was \$5.50 per thousand in both contracts.

Q. Did the Hollister Amos people pay in fact that sum to the Indians.

A. They did.

Q. Who received the logs on the Hollister Amos contract.

129 A. Hollister and Amos received them, the money was paid to me, that is deposited in the bank at Milwaukee to my credit as agent.

Q. Now I show you Ex. No. 3 which purports to be a statement signed by you as Indian Agent to the Hollister Amos Company for logs cut upon school section 16, and ask you whether that is your handwriting and the original statement sent them.

A. It undoubtedly is, it is my handwriting.

Q. What logs did that bill purport to cover.

A. Logs cut on the sixteenth section in Town 30, Range 13.

Q. The amount called for by that bill is \$9637.70. I will ask you

whether that sum was in fact paid by the Hollister Amos people to the Indians.

A. It was deposited to my credit as Indian Agent in Milwaukee with the United States Depository there.

Q. That was for the work of cutting and banking the logs.

A. That was to pay for banking those logs, cutting and banking them.

Q. What if anything was included in that bill for the stumpage.

A. Nothing.

Complainant offered in Evidence Ex. No. 3.

Q. You may state whether or not the contract with the Hollister Amos people had a like condition in it requiring the Hollister Amos people to convey their remaining interests in these lands to the United States after the timber was cut.

A. It did, this contract simply called for the pine and no other timber. After the pine was removed then they were deeded back.

Q. The contract called for pine and cedar.

A. Well I don't recollect, there was a lot of cedar cut there
130 one year. Well I had forgotten but my recollection was it was only pine. There was no cedar cut by the Oconto Company.

Q. You remember that the Hollister-Amos people after they had removed their pine did convey to the United States.

A. They did convey the title, so I was informed anyway.

Q. Mr. George, while you were Indian Agent at Keshena was there any controversy between the State of Wisconsin and the United States with reference to the cutting of timber upon the swamp lands.

Defendant objected as immaterial.

A. Well I am not positive what year that was but one year the State attached the drives, stopped the drive over here for trespassing on swamp land.

Q. The State of Wisconsin.

A. The State of Wisconsin, yes sir.

Q. And were you representing the Government in any appraisalment of logs in controversy.

A. I helped scale up the trespass on the swamp lands with two men that were sent here by the State and Mr. Doyle also, he was logging at the time and he was on the ground at the time.

Q. What became of that controversy and how was it adjusted if you know.

Defendant objected as immaterial.

A. It was adjusted by the Government paying the State for the timber cut on the swamp lands.

Q. To the State.

A. To the State, I mean the United States Government settled it by paying the stumpage value for the timber removed
131 from those swamp lands at that time.

Q. Do you remember Mr. George, what price per thousand feet the stumpage and pine was put in at by the United States.

A. I am not positive, I think it was eight dollars.

Q. You do remember you were one of the appraisers.

A. Yes sir.

Q. Acting for the United States.

A. Yes sir.

Q. How did your appraisal compare with the sum actually paid, if you know, your own individual appraisal.

A. I think the stumpage value was paid exactly as I recommended. I know where there was a controversy between the State man and myself, he wanted three or four dollars more a thousand than I was willing to recommend and I think they paid him exactly what I recommended.

Q. Just what position did your office take while you were agent at Keshena acting under instructions from the Commissioner of Indian Affairs with reference to the ownership of the timber upon school sections 16 on the Menominee Reservation.

Defendant objected as incompetent, irrelevant and immaterial.

A. Well the instructions while I was agent was *not* to meddle with any timber on the sixteenth sections. Not to remove any timber from them under the Government logging.

Q. The question I asked you was somewhat broader than that, what interest did the department concede to be in the State of Wisconsin in the timber during the time you were Agent at Keshena.

132 Defendant objected same as above.

A. The title was not questioned in regard to those lands during the time I was agent, only the right of occupancy.

Q. What do you mean by that the title was not questioned who was admitted or supposed to be the owner.

Defendant objected as incompetent.

Q. In whom was the title unquestioned in the timber.

Defendant objected as incompetent, irrelevant and immaterial and calling for a conclusion.

A. The parties holding the title.

Q. From whom.

A. From the State.

Q. What if anything was the attitude of the Department and your office with reference to the right of occupancy of these school sections.

Defendant objected same as above.

A. They claimed the Indians had the right of occupancy of the lands.

Q. While you were agent at Keshena you came to Shawano very often did you not.

A. Yes sir.

Q. And you kept in touch with the various business men in Shawano in money matters.

A. Yes sir.

Q. You still owned your property here and took and interest in the public affairs of the city.

A. I did.

Q. You often met various representative men of Shawano upon your visits to Shawano.

A. Yes sir.

133 Q. Do you know whether at any of those visits discussions were had between you and various people here with reference to the rights of the State and its grantees in the timber on this reservation.

Defendant objected as incompetent, irrelevant and immaterial, also hearsay.

Q. Why yes that matter was talked about a great many times with people I met and talked about it.

Q. You informed all who inquired just what the attitude of the Department was and what your instructions were.

Defendant objected as incompetent, irrelevant and immaterial, and suggestive.

A. Yes sir.

Q. What if you know was the common understanding among the business people of Shawano as to the ownership of the timber on school sections on the Menominee Reservation.

Defendant objected as incompetent, irrelevant and immaterial.

A. The timber was supposed to be owned by the parties holding the title from the State.

Defendant moved the answer be stricken out for the reason that it is the conclusion of the witness and for the further reason that it is incompetent, irrelevant and immaterial.

Q. While you were Indian Agent at Keshena did Mr. H. C. Haysen act as Government Trader.

A. He was trader during part of the time I was there.

Q. He purchased some of these lands from the State of Wisconsin did he not.

Defendant objected as incompetent, irrelevant, immaterial and not the best evidence.

A. Well I don't know when he made the purchase, I know he owned some lands up there but when he made the purchase

134 I don't know, I have known for a number of years that he had an interest in lands on the Reservation.

Q. Do you remember about the time he purchased from the State any conversations were had between you and him relative to the ownership of the timber on the school sections.

Defendant objected as incompetent, irrelevant and immaterial.

A. Why I don't recall any, not at this time.

Q. Not specific.

A. Not specific talks we had.

Q. What if anything have you heard with reference to the Henry Sherry trespass case.

Defendant objected as incompetent, irrelevant and immaterial.

A. Sherry had more than one trespass case there. There was one trespass case on Sec. 16-30-16 that occurred several years before I was Agent. I don't know just how long. The Indians cut some timber on that section and drove it down the river and it was attached I think by Mr. Sherry and he got possession of the logs, and while I was Agent some of the Indians that banked this timber came to me and said they never got pay for banking it and wanted me to get pay from the Government for banking the logs. Mr. Sherry simply took the logs and paid nothing. That trespass occurred on this same section that the Oconto Company—

By Mr. Thompson: Wasn't that replevin instead of attachment, that form of action Mr. Sherry took.

A. Well possibly replevin, I don't know I know Mr. Sherry took possession of the logs and the Indians never got any thing for banking them.

By Mr. Eberlien: Were you able to collect from the United States for the Indians for the banking of these logs that Mr. Sherry
135 got.

A. I never tried.

Q. You heard about another trespass upon the Sherry lands in which compensation was paid to Mr. Sherry by the United States.

Defendant objected as incompetent, irrelevant and immaterial.

A. Why of my own personal knowledge I don't know anything about that.

Q. I simply asked you what you heard, what the rumors were about that?

Defendant objected.

Q. What you heard with reference to that first Sherry trespass?

A. That was a trespass in section 16 in 30-15, Mr. Sherry went in there and built some camps and skidded a lot of logs and I was always informed by the men I was acquainted with that he received compensation for the logs that he cut and expenses that had been made in starting in logging.

Defendant moved that the answer be stricken out.

Q. From whom did Mr. Sherry receive compensation?

A. From the Government.

Q. I will now ask you, Mr. George, whether what you heard was not actually rumored on the streets of Shawano?

A. It was.

Defendant objected.

Q. Keshena Falls are commonly spoken of as the Falls of Wolf River, are they not?

A. I don't know. Late years they have been called Keshena Falls.

Q. In an early day when the Indians were removed upon this reservation they speak of being removed to the Falls of Wolf River. I will ask you whether you have any definite knowledge as to just where that point is now.

A. I have not.

Q. What is the largest falls on the Wolf River.

A. Largest falls are probably the Keshena Falls, taking the two falls together.

Q. How far above the village of Keshena are these falls located.

A. Oh I should say a mile.

Q. Was there ever any mill built on any other falls than the present Keshena Falls to your knowledge.

A. No sir.

Q. The early correspondence speaks of a mill being built on the Falls of the Wolf River, can you now definitely locate the point where that must have been.

A. That is the only mill I have ever known of being built on Wolf River on the Reservation was at the Falls.

Q. While you were Indian Agent at Keshena you had more or less opportunity to learn the character of the school sections upon the Reservation and know the kind and quality of the land and the timber upon them.

A. I have not been on only three I think of the school sections on the Reservation. I have been all over the other parts of the Reservation.

Q. You had definite information however as to the kind of lands the other ones were upon which you were not.

A. I don't know as I had any information except my own knowledge traveling through the country.

Q. I will ask you whether those lands now comprising school sections upon the Menominee Reservation whether they are mineral lands.

A. I have never considered they were. I never heard anybody speak of mineral lands on the Reservation.

Q. Their value now consists in what.

Defendant objected as immaterial.

A. Well principally the timber.

Q. In case that timber is removed, Mr. George, what in your opinion would be a fair price for the lands remaining per acre.

Defendant objected as immaterial and for the further reason no sufficient foundation for an answer to that question.

A. From five to ten dollars an acre.

Q. You know the value of cut over lands in northern Wisconsin.

A. I do.

Q. You have bought and sold cut over lands.

85

A. Yes sir.

Q. And from your experience in that direction you give your testimony that these lands after the removal of the timber should be worth from five to ten dollars per acre.

A. I did.

Defendants objection as to the qualifications of the witness withdrawn.

Q. What in your opinion was the fair stumpage price per thousand feet for the timber removed by the Oconto Company under its contract with the United States, upon Sec. 16o30-16 at the time of its removal.

Defendant objected as immaterial.

A. I should judge at that time that was worth about \$12 a thousand stumpage.

Q. \$12 a thousand board measure.

A. Yes sir.

Q. And the same would hold true of the pine removed by the Hollister-Amos people from the same section, town and range.

138 Defendant objected as immaterial.

A. About the same.

Q. The Oconto Company cut only the pine as I understand it.

A. That was all.

Q. The Hollister Amos people cut some cedar.

A. It seems so; I had forgotten that.

Q. About what in your opinion was the stumpage value that time of the cedar removed by the Hollister Amos Company.

Defendant objected as immaterial and for the reason that this witness has testified he did not know that the Hollister Amos people cut any cedar.

A. I don't know what cedar was worth anyway.

Q. Mr. George we called your attention to a letter written in November, 1897, by the Department to you in which you have stated you were informed not under any circumstances to cut or enter into a contract for cutting the timber on section 16; I will now ask you whether there was some correspondence had between you and the Department leading up to that final letter.

A. There was.

Q. Just give us briefly the nature of those former letters.

Defendant objected as incompetent, irrelevant and immaterial, not the best evidence, no proper foundation having been laid for the introduction of secondary evidence.

A. In the fall of 1897, the Indians complained that Sec. 16o30-16 which has been logged all around and there had some timber been burned on it was in danger of the timber being destroyed by fire, and they asked to be permitted to bank that timber as part of

their government contract that year. I wrote a letter to the Indian

Office stating the conditions and said that the Indians wanted
139 to bank the timber, and asked them if I should allow them
to bank it. I got a letter back from the Indian Office stating
that the Indians had the rights on the sixteenth sections that they
had on any other lands in the Reservation. I got a long letter but
it was only a letter; they didn't tell me whether to let them bank it
or not to bank it. So I answered that letter that under their letter
they informed me the Indians had all rights on sections 16 that they
had on other lands and I would immediately enter into contracts
with them to bank the timber on this section. I received a letter
from the Department stating that I had misconstrued their letter;
under no circumstances to allow the Indians to cut any timber upon
the sixteenth sections.

Q. How long a time intervened between your first letter to the
Department and the final letter in November of which you have
spoken; how much time intervened between your first letter and the
last.

A. I am not just positive when that correspondence was had, but
the correspondence was not more than 3 or 4 weeks from the time I
wrote the first letter until I had been notified not to allow the Indians
to cut any timber.

Q. You never kept copies of the letters you wrote to the Depart-
ment.

A. Always.

Q. Those are on file in Keshena.

A. Yes, sir; they should be.

Q. They are not now in your possession.

A. No, sir.

Q. You have no way of getting them.

A. No, sir.

By Mr. Eberlein: We ask that the Government produce all of the
correspondence relating to the same subject matter, including
140 the letters written by Mr. George to the Commissioner of In-
dian Affairs as well as those received by Mr. George from the
Commissioner in the fall of 1897 relating particularly to the cutting
or contemplated cutting of logs upon school section 16-30-16 which is
covered by our notice and subpoena. Mr. Martin may stipulate if
you have the originals you will produce them and file them here
and have them offered as evidence as if we now had the originals
and offered them, and in case you do not produce the originals *no*
objection is made to secondary proof being offered other than on the
ground of incompetency, irrelevancy and materiality.

By Mr. Martin: The Defendant does not decline to introduce
or offer the letters suggested by counsel but on account of the indefi-
nite nature of the notice and the extremely short length of time
allowed for getting the necessary correspondence and letters it has
been a physical impossibility to have here at this time the letters
and correspondence mentioned in the notice to produce, and for the
same reason it has been impossible for Mr. Nicholson, the Agent of

the Menominee Reservation to produce those letters or documents but if the letters can be found in the future they will be exhibited to the attorneys for the complainant and such objection may be then made to their competency and relevancy as may be proper.

By Mr. Thompson: And the Complainant can offer them in evidence.

By Mr. Martin: The Complainant can then offer them in evidence subject to the objections made by the defendant. We do not stipulate however that if the letters are not produced that secondary evidence as to their contents may be accepted as binding if we can produce the letters we will.

141 By Mr. Thompson: And at the time you produce them we can offer them in evidence.

By Mr. Martin: Subject to any objection I may make.

Cross-examination by Mr. Martin:

Q. Mr. George, when you refer to section 16, in Town 30, 16, according to what survey are you speaking to identify that section.

A. Why, I don't know what survey it was, the lines were all established when I was there and the lines were run.

Q. That was in 1897, to 1902.

A. Yes sir.

Q. You are speaking of a survey, an official survey that has been approved prior to that time.

A. The corners were all established, I think we found every corner on the section when we cut the timber and cut by the lines that were established at the time.

Q. Now was there any difference in the way the timber was cut on section 16, and the rest of the reservation.

A. Not particularly at that time, they wasn't handling hard wood at that time and very little cedar, there may have been a little cedar cut.

Q. I understand the contracts you have referred to as the Hollister Amos and Company and Zachow are substantially the same as the Oconto Company contract.

A. They were supposed to be.

Q. It is stated in the Oconto contract, one of the considerations for cutting the timber at that time was the danger it was in from forest fires.

A. Yes sir.

Q. That same thing true of the other contracts.

142 A. Yes sir, the more slashings you make the more danger of fire.

Q. And that was one of the inducements to enter into the contract for the removal of the timber at that time.

A. Yes sir.

Q. And that was true of the other contracts.

A. Yes sir.

Q. The other contracts only provided for the cutting of the pine timber.

A. Well, I am not positive in regard to that.

Q. I understood you to testify on direct examination it did.

A. That is my best recollection of the contract.

Q. What other timber was on these lands besides pine.

A. Oh, there was some tamar-ck, some hard wood and some cedar: Where the heaviest pine stood on section 16 there wasn't much of anything left but stumps when we got through but a portion of the section had hard wood timber on it. The Oconto River ran through the section and there was some cedar there.

Q. That was conveyed to the Indians by the respective parties.

A. Yes sir.

Q. They only got the right to cut the pine timber.

A. That was my recollection.

Q. Now you said a conveyance of title to the United States, you are talking generally in regard to that, you haven't any definite knowledge of it.

A. I have definite knowledge they did convey.

Q. Do you know whether the deeds were accepted by the United States.

A. That I couldn't tell you, I was notified that the conveyance was made and everything had to be settled before I allowed them to take possession of those logs. I received a notice every thing

143 was closed up before I allowed them to take the logs.

Q. You spoke with reference to conversations you had with parties here in Shawano and the General current rumor as to the status of the title to that land.

A. Not the title but the trespass.

Q. The Indians had a right to section sixteen, didn't you testify to that, on direct examination?

A. What?

Q. That you discussed with people in Shawano as to their rights.

A. Yes sir.

Q. It was understood was — not generally in Shawano and the impression was so got by you that the purchasers from the State had no right to go on the lands and cut the timber in the absence of an agreement with the Government?

A. It certainly was.

Redirect examination by Mr. Eberlein:

Q. With reference to the rumors here and conversations you had about the Government's attitude that the grantees from the state couldn't cut the timber, that was merely the position that the Government took, they wouldn't allow them to go on there and cut the timber without permission, that was the Government's attitude?

A. That was the Government's position that the Indians had a right of occupancy and they wouldn't allow anybody to go on there without permission?

Q. But the title to the timber itself was never questioned?

A. Not during my time.

Q. During the time that the Oconto people and the Hol-
 144 lister Amos people took that timber on section 16-30-16 what
 if anything was hard wood stumpage worth at that time, the
 remaining hard wood stumpage that was left?

A. Nothing in that locality.

Q. No was of getting it out?

A. No sir.

Q. The pine lands are they of good quality or are they inclined
 to be sandy and poor for farming purposes?

A. Generally a light soil.

Recross-examination by Mr. Martin:

Q. During the time you were Indian Agent do you recall receiving
 a letter from the Indian Commissioner or Department of the Interior
 with reference to the erroneous issuance of patents to the State for
 school sections and swamp lands and a demand on the State for a
 reconveyance?

A. I don't know, I know the patents issued on the Stockbridge
 Reservation there was thirty of them that were entitled to patents.

Q. I mean patents to the state of the school sections.

A. I don't recall any.

Q. You d/k'n't recall that?

A. No sir.

Complainant offered in evidence Ex. 4, being the subpoena duces
 tecum and we will follow it with an order for the same.

The complainant called M. J. WALLRICH, who being duly sworn
 testified as follows:

Direct examination.

145 By Mr. Eberlein:

Q. Your name is M. J. Wallrich?

A. Yes sir.

Q. Are you at present the owner of any lands within the limits of
 the school sections of the Menominee Reservation?

A. I claim to be.

Q. What lands do you claim to be the owner of?

A. West half of section- 16-29 and 13.

Q. From whom did you purchase that land?

A. From E. Stange and wife of Milwaukee, Wisconsin.

Q. Do you know to whom the state of Wisconsin patented those
 lands?

A. I do not.

Defendant objected as not the best evidence and for the further
 reason it does not appear that the State of Wisconsin has patented to
 anybody.

Q. When did you purchase those lands?

A. The 28th of September, 1900.

Q. Your business is what?

A. Practicing law.

Q. At that time were you practicing law?

A. I was.

A. You were familiar with the United States Supreme Court decision of Beecher vs. Wetherby?

A. Defendant objected as incompetent, irrelevant and immaterial.

A. I had read it over and supposed I understood it.

Q. Had you heard of the contract between the Oconto Company and the United States with reference to their logs on section 16o30-16?

Defendant objected as incompetent, irrelevant and immaterial.

146 A. I had.

Q. What else had you heard with reference to contracts made by the United States with private persons, relating to lands on section 16?

By Mr. Martin: It may be stipulated that the objection I make to that may go to each question.

By Mr. Eberlein: Yes.

A. I did some business for one W. G. Zachow who purchased a forty of timber land on this same section, 16o30-16, I think the same winter that the Oconto Company logged on that section and I knew of that contract.

Q. Did you see the original contract?

A. I did not.

Q. Do you know of your own knowledge that Mr. Zachow came into possession of the logs cut upon his lands in section 16?

A. Not any other way than what he told me and what Mr. George told me the Agent at the reservation.

Q. And what did they tell you, as to what Mr. Zachow received in the way of logs from that section?

Defendant objected as incompetent, irrelevant, and immaterial and hearsay.

A. Why, I was informed that Zachow had the right to go on to that section and cut the timber that he recently purchased of one George Baldwin of Appleton.

Q. Had you heard anything relating to the Sherry trespass upon section 16, on the Reservation in Town 29?

Defendant objected as immaterial, incompetent and irrelevant.

A. Simply rumor.

Q. What was the rumor you heard?

Defendant objected same as above.

147 A. That Scherry cut some timber on a sixteenth section and that the Government stopped him, something to that effect.

Q. What was the outcome?

A. I don't know.

Q. Never heard?

A. No, I never heard.

Q. After you bought this land upon what did you rely with reference to the title?

Defendant objected as incompetent, irrelevant and immaterial.

A. Why, I relied largely upon Beecher vs. Wetherby, and relied upon the Government negotiating to have the Indians cut the timber on the sixteenth sections, 30-16, and upon general information obtained from the Agent that there was no question but what the State owned the title to the sixteenth sections but that the occupancy remained in the Indians and felt that the occupancy of the lands in sec. 16-29-13 was of little value as it was a long ways from any residence, no one living near at that time and I didn't think I would be in any danger of anybody going in on that land and cutting any timber and making a farm of it, appropriating the timber with the right of clearing.

Q. What did you pay for that land, Mr. Wallrich?

A. One thousand dollars cash.

Q. How long have you paid the taxes upon that land?

Defendant objected as incompetent, irrelevant and immaterial.

A. Ever since I received the deed.

Q. Paid taxes in Shawano county?

Defendant objected same as above.

A. Paid taxes in the town of Richmond, Shawano County, Wisconsin.

148 Q. And you have paid those taxes and got tax receipts?

A. Yes sir.

Q. Have you the tax receipts with you?

A. No, sir.

Q. That is State, County and Town tax, is it?

A. State, County and Town tax.

Q. And road tax?

A. And road tax, yes sir.

Q. Have you seen any opinions of the Land Office with reference to the title to the timber on these school sections?

Defendant objected as incompetent, irrelevant and immaterial.

A. I have never had any occasion to examine any of them.

Q. How much taxes have you paid on these lands?

Defendant objected same as above.

A. Why ever since 1910, I have got the exact amount for each year—

1910.....	\$21.04
1911.....	22.16
1912.....	28.00
1913.....	39.20
1914.....	35.84
1915.....	40.40

I took those figures off my tax book this morning, from 1900 to 1910, the taxes of each year are in the tax receipts and have not been transferred into the tax book but which I can get of necessary, but it would average about twenty dollars a year up to 1910.

Cross-examination by Mr. Martin:

149 Defendant moved that the testimony of this witness be stricken out for the reason that it does not appear that he has any interest in this cause of action, nor does it appear that he is entitled to the lands from the State of Wisconsin.

Q. As I understand you bought 320 acres of land for a thousand dollars.

A. Yes sir.

Q. What did you buy?

A. What did I buy?

Q. Yes, what did you pay a thousand dollars for?

A. For the lands and timber.

Q. You understood you were getting the lands as well as the timber?

A. Subject to the right of the Indians occupying it.

Q. There was a pretty heavy stand of timber on this land wasn't there?

A. Quite so.

Q. Outside of its timber value the land is worth I believe Mr. George testified \$10. an acre?

A. I wouldn't consider it in that neighborhood worth to exceed \$5 an acre.

Q. What is the probably amount of timber on this 320 acres that you purchased?

A. Just about 275 thousand per forty.

Q. Worth how much?

A. Ought to be worth \$4 a thousand at the present time.

Q. That means after taking out the expense of cutting the logs?

A. That is the stumpage value.

150 Redirect examination by Mr. Thompson:

Q. The value at the time you bought of both the land and timber was much less than what it is now I presume.

A. From 1898 to 1900 in territory much better than this territory is located, nearer the market and better to get at, we bought lands for \$2.50 to \$3.00 an acre with just as much timber on as there is on this particular half section. Lots of land in Langlade County

just north of this reservation during that time was sold for taxes and much of it. Land that we now own during that period of time was sold for taxes, so the price of hardwood timber lands now compared with 1900 was much less than it is now.

Q. This particular lands of yours is hardwood timber.

A. Hardwood timber.

Q. No pine on that to speak of.

A. Scarcely any.

Q. And the price you paid was that a fair price.

A. Was a big value, was a big price.

Q. A good fair price.

A. A fair price. All it was worth, I could have bought some land off the reservation for nearly the same price at the time. In fact in 1898 I bought better land than this for \$2. per acre. More timber per acre on it.

Recross-examination by Mr. Martin:

Q. But not subject to the right occupancy.

A. Not subject to the right of occupancy.

Q. What was the inducement for the purchase of this property when you knew and understood that the Indians had the right of occupancy?

A. Why I supposed that I could get in there in time and get that timber the same as the Oconto Company could contract with the Indians and get that timber out.

Q. You understood of course you couldn't go in and cut the timber unless you gained permission of the government acting on behalf of the Indians.

A. No I did not.

Q. You understood that the Indians *has* the right of occupancy?

A. I didn't think that I had the right of occupancy.

Q. You have never cut any timber on this land have you?

A. No sir.

Q. You have never applied to the United States for permission to cut it?

A. No sir.

Q. It has never been cut so far as you know?

A. I don't know of any.

Redirect examination by Mr. Thompson:

Q. You have bought a great many thousand acres in counties surrounding the reservation during this time have you not?

A. Good many thousand.

Q. Timber land?

A. Timber land.

Q. And you hold a good deal of other land today uncut?

A. Yes sir.

Q. In other words you have faith in values going up?

A. If I didn't I wouldn't keep on hanging on to it and paying the taxes.

152 The Complainant called F. W. HUMPHREY, who being duly sworn testified as follows:

Direct examination by Mr. Eberlein:

Q. Your name is F. W. Humphrey?

A. Yes sir.

Q. You reside in the City of Shawano?

A. Yes sir.

Q. How long have you lived in the City of Shawano?

A. Since 1881.

Q. What is your business?

A. Banking.

Q. Are you acquainted with Dewey H. George?

A. Yes sir.

Q. How long have you known him?

A. 33 years, something like that.

Q. Knew him when he was Indian Agent at Keshena?

A. Yes sir.

Q. Going back to about the year 1885 what arrangement if any did you make with the State with reference to purchasing part of school section 16-29-14?

Defendant objected as incompetent, irrelevant and immaterial.

A. I bought some land of the State, school section land.

Q. Who is Della C. Humphrey?

A. My wife.

Q. In buying that land for her in what capacity did you act, as her agent or otherwise?

A. As her agent.

Q. You transacted all the business by which this title was
153 acquired in the name of your wife?

A. Yes sir.

Q. I show you Ex. No. 5 and ask you whether that is the patent that you procured for your wife and H. C. Hayter, of the land in Sec. 16-29-14?

A. Yes, this was the patent.

Q. That has been recorded has it?

A. Yes sir.

Complainant offered in evidence Ex. No. 5.

Q. You may state if you know whether Della Humphrey and H. C. Hayter still own that land.

A. They do.

Q. When you purchased this land from the state what was your understanding as to the kind and character of the title that you got?

Defendant objected as incompetent, irrelevant and immaterial.

A. Well, I understood that I got absolute title to the land and all that was connected with it.

Q. When did you first learn that a claim was made by the Gov-

ernment of the United States that the Indians had a right of occupancy on that land that you bought?

A. I think it was the time that Dewey George was the agent at Keshena.

Q. Up to that time your absolute title to both land and timber was never questioned.

A. No sir.

Q. When did you first learn that the Government claimed both land and timber, when was you first told of that claim?

A. Why that is since Mr. Nicholson has been up to 154 Keshena, or Neopit, about three years ago I think or such a matter.

Q. Have you conceded such a position?

A. No sir.

Q. Have you conceded any right to the Indians to occupancy?

A. No sir.

Defendant objected as immaterial.

Q. What was the current report here among persons who dealt in lands and were acquainted with the situation as to the greatest right that the Government claimed prior to Mr. Nicholson's administration in those school sections.

Defendant objected as incompetent, irrelevant and immaterial.

A. Well the only claim that I ever knew of was that they wouldn't let us go on the lands to cut the stuff off, they wouldn't give us any right of passage over the Indian Reservation to get on the land, the only question that I ever heard. They wouldn't give us a road into it.

Q. Have you at any time authorized acting as agent for your wife the cutting of any timber upon these lands covered by your patent marked Ex. No. 5?

A. No sir.

Q. You may state whether of your knowledge that your wife has given any one permission?

A. No sir she has not of my own knowledge.

Q. You have paid for your wife the taxes upon the land?

A. Yes sir.

Q. How long have you been paying taxes upon these lands, to the best of your recollection?

A. Since 1885 so far as I know.

155 Q. Do you know approximately how much those taxes were a year for the last five years?

A. I think in the neighborhood of 30 or 40 dollars a year.

Q. Have you ever been on the section?

A. Yes sir.

Q. You may state whether or not it is mineral land.

A. No sir, I don't think so. I did not see any indications of it when I was there.

Q. In what does the greatest value of that property consist?

A. Timber.

Q. After the removal of that timber what in your opinion would the lands be worth?

A. Oh possibly \$5 an acre.

Q. Are some of those lands swampy in character, unfit for almost anything after the removal of the timber?

A. There is a creek runs through this section and some parts of it is quite low. Quite a little cedar on it.

Q. What is the value of that class of land?

A. In that locality I should think it might be worth 3 to 5 dollars an acre, something like that, swampy land.

Q. Your contract with the State was made in 1885?

A. To the best of my recollection yes sir.

Q. And the patent was secured in 1901?

A. The patent was secured in 1901, when we paid the State up. We paid the State interest for a good many years on the contract.

Q. You paid the State its regular price for the lands?

A. Yes sir.

Q. How much per acre was that?

Q. Well as I recall it now it was \$50 a forty.

156 Q. And the State was parting with any number of lands of its domain at that price at that time?

A. Yes sir.

Q. Has anyone to your knowledge ever lived on that section of yours?

A. No sir.

Q. No improvements of any kind made upon it?

A. No sir except trespass. I have not seen it but have heard there was some trespass on it.

Defendant objected when he says he has not seen it.

Q. You have not seen the claimed trespass?

A. No sir I haven't seen it. We sent a man up there and had it examined.

Q. And reported a trespass?

A. Yes reported a trespass.

Q. And that was the cutting that led up to this suit?

A. Yes sir.

Q. Have you ever been paid by the Government or anybody else for that trespass up to that time?

A. No sir.

Q. Have you demanded compensation?

A. Well we had it examined and wanted our pay.

Defendant objected to the introduction of Ex. 5 in evidence for the reason that it does not appear that it contains any words of warranty, and the witness at present on the stand or his wife or H. C. Hayter to whom the patent seems to have been issued are not parties to this suit.

Cross-examination by Mr. Martin:

Q. You have not been on the land personally since this claimed trespass?

157 A. No sir.

Q. And all you know about timber being cut on the land is what has been reported to you by others?

A. By the man we hired to go up there.

Q. He gave you his report?

A. Yes sir, we hired him to go and examine the trespass.

Defendant at this time moves to strike out the testimony of the witness with reference to the alleged trespass and cutting of timber on this land for the reason it is hearsay.

Q. Now you say at the time you purchased this land you understood you got absolute title?

A. Yes sir.

Q. From whom did you understand that?

A. From the State.

Q. You never cut any timber on the land yourself or for your wife?

A. No sir.

Q. And you never exercised any affirmative acts of ownership over the land except paying the taxes?

A. No sir, I never made any improvements on it.

Q. You never made any actual use of the land?

A. No sir except to pay the taxes and hold it for an investment.

Redirect examination by Mr. Eberlein:

Q. You repeatedly *was* upon this land?

A. Well I never was there very often. I have been there once or twice since I have owned it.

158 Q. Were you at any time interfered with when you went to look at this land?

A. No, sir.

The Complainant called H. C. HAYTER, who being duly sworn testified as follows:

Direct examination by Mr. Eberlein:

Q. Your name is H. C. Hayter?

A. Yes sir.

Q. You reside in the city of Shawano?

A. Yes sir.

Q. I show you exhibit No. 5 purporting to be a patent from the State of Wisconsin to Della Humphrey and H. C. Hayter and ask if you are the Mr. Hayter named in that patent?

A. I am.

Q. What did you pay the State of Wisconsin for that land?

A. 10 shillings an acre, that was the regular price of land anywhere.

Q. When you purchased that land what did you understand you were getting?

A. I supposed I was getting the land, timber and everything.

Defendant objected to the question and asked that the answer be stricken out as incompetent and immaterial.

Q. You were Government Trader at Keshena?

A. Yes sir.

Q. During the time Mr. George was there?

A. Yes sir.

159 Q. During that time you heard a good deal about the school sections and claims made by both the State and United States.

A. Yes sir.

Q. When was the first time that you heard of the claim of the Government that the Indians had a right of occupancy upon these lands?

Defendant objected as immaterial.

A. Not but a few years ago. I couldn't say the number of years but not so many years ago.

Q. While you were at Keshena did you often discuss these questions with Dewey George the agent?

Defendant objected as immaterial.

A. I suppose I did, I don't remember about that.

Q. Did you at the time you were Trader at Keshena know of the Oconto Company people taking off that timber on 16-30?

A. Yes sir.

Q. That was before the date of this patent?

A. No, it was after the date of this patent.

Q. This patent is dated in 1901 and they took their timber off in 1898, you purchased before but didn't get your patent.

A. I don't know when we got the patent but I know we purchased before.

Q. That is you made a contract?

A. Yes sir.

Q. But you made your final payment when you got the patent?

A. Yes we never got the patent until we made the final payment.

Q. Prior to that time the Oconto Company had logged their
160 section?

A. Had logged their section.

Q. How long did you pay taxes on this land?

A. Ever since we owned it, I don't know how long.

Q. What was the understanding in the City of Shawano among the business men as to the greatest claim that the government made?

Defendant objected as incompetent and immaterial.

A. I never heard them make any claim until the last few years.

Q. Then what did they claim?

A. They claimed they had the right of occupancy and now they claim they own the land.

Q. What was the understanding or attitude of the agency if you know?

Defendant objected as incompetent, irrelevant and immaterial.

A. That the land belonged to the State.

Q. Did you during the time you were trader at Keshena write to the State to find out just what title they in fact had?

Defendant objected as incompetent, irrelevant and immaterial.

A. Why no, I don't know as I ever corresponded with the State about it.

Q. Did you correspond with the State with reference to the trespass upon the school sections?

A. Yes sir.

Q. Did you receive a reply from the State?

A. Yes sir.

Defendant objected as immaterial.

Q. I show you Plaintiff's Ex. No. 6 and ask you whether
161 that is the letter that you received from the State Treasurer relative to the attitude of the State in this matter.

A. Yes, it is.

Complainant offered in evidence Ex. No. 6.

Defendant objected to the introduction of Ex. No. 6 for the reason that it is incompetent, irrelevant and immaterial.

Q. Mr. Hayter before you purchased these lands from the State had you heard that the Supreme Court had decided a case arising on the Stockbridge Reservation similar to this one here.

Defendant objected as immaterial.

A. Certainly I had.

Q. And what was reported to you as to the holding of the Supreme Court in that case?

A. That the State owned the land.

Defendant objected as incompetent, irrelevant and immaterial.

Q. That was your understanding?

A. That was my understanding.

Q. Did you rely upon that when you purchased these lands?

A. I did, yes sir.

Defendant objected as incompetent, irrelevant and immaterial.

Q. I show you Exs. 7 to 34 inclusive, being tax receipts upon 16-29-14 and ask you if those are the taxes paid by you and Mr.

Humphrey upon these lands to the treasurer of the town of Richmond?

A. Yes sir.

Complainant offered in evidence Exs. 7 to 34 inclusive.

Defendant objected to the introduction of the tax receipts in evidence for the reason it is wholly immaterial whether the State taxed the land or not, it does not in any way affect the title.

Q. You have been upon the land in this section 16?

A. I have yes.

Q. You may state whether or not it is necessary to cut the timber upon that section to preserve it.

Defendant objected as immaterial.

A. Why I don't think so.

Q. What is the general character of that timber?

A. Good thrifty timber, green.

Q. You may state whether or not a large part of it is still young and growing?

A. Some of it and some of it is not. Hard work to tell that. Some of it is young timber.

Q. What deterioration have you known since you have known it.

A. None, it has increased in value.

Q. By growth?

A. By growth.

Q. No one lives on this section?

A. Not that I know of.

Cross-examination by Mr. Martin:

Q. I understand you were trader?

A. Trader at Keshena, yes sir.

Q. How long ago was that?

A. That was in 1898 I guess, 1898 or 1899, I was trader there twice, I think it was 1890 and 1891 under Mr. Clayton and then I was trader under Mr. George a couple of years.

Q. Explain what trader means.

163 A. Why run the store up there and trade with the Indians.

Q. Your store located on the reservation?

A. Yes sir.

Q. You had to secure permission from the Government?

A. Yes sir.

Q. Receive a license?

A. Yes and gave bonds.

Q. During the time you were trader were you permitted under your license and under existing laws and regulations to purchase or deal in Indian lands?

A. No sir.

Q. When was this contract for the purchase of this land made with reference to the time you were trader?

A. We bought it long before I was trader, Contracted for it.

Q. How long before?

A. Why I should think it was 10 or 12 years, 15 I don't remember. Quite a while though.

Q. That would put it back to 1880 wouldn't it?

A. Somewheres along in there I should judge.

Q. Then this patent that has been offered in evidence Ex. No. 5 was pursuant to that contract?

A. To that contract. When we paid for the land they gave us a patent. During that time we were paying interest on the money.

Q. At the time that you contracted for the purchase for that land the Oconto Company had never cut any timber upon the Reservation?

A. No sir.

Q. You didn't know anything about that contract, it was not in existence at that time?

164

A. No sir.

Q. With reference to the Beecher vs. Wetherby case did you know about that prior to your contract?

A. Certainly.

Q. How long prior?

A. I knew it after that case was decided. I don't know when that was decided or anything about it but I remember the circumstances.

Q. You never read the decision?

A. No I never read the decision.

Q. You didn't rely upon what current report was?

A. Current report and the fact I was working for Upham and Russell at that time the Beecher and Wetherby case came off and Wetherby beat Beecher.

Q. You assumed the status of that land was exactly the same as the rest?

A. The Stockbridge reservation was a part of the Menominee Reservation.

Q. You never read the decision?

A. No sir.

Q. And relied upon current reports with reference to it?

A. Yes sir.

Q. You say that you understood at the time you contracted for this land that you got absolute title?

A. Yes sir.

Q. And got that from the State of Wisconsin?

A. Yes just the same as I bought it anywhere.

Q. The State represented to you that they owned the land?

A. Yes sir.

Redirect examination:

165

Q. This is the same land that you are testifying in regard to that Mr. Humphrey said a contract was made about 1885 with the State?

A. I don't remember just when, it is so far back.

Q. You didn't mean to say it was as early as 1880 but it was somewhere 1885?

A. I don't know exactly when we entered into that contract, but it was along in there, I know we carried it quite a number of years and paid up and got a patent.

Recross-examination by Mr. Martin:

Q. Now, you spoke of cutting, whether it was necessary to cut young timber upon this land, have you estimated the timber cut on the land?

A. No sir, been no timber cut on the land that I know of. I have never been there myself, only what our cruisers told us.

Q. You have no personal knowledge of it?

A. I have never been there since it was cut no sir. We have sent cruisers up there and they claim it has been cut.

Q. You said it was not necessary to cut the timber in order to preserve it, you are basing that on the report of the cruisers.

A. That is about all yes. I have *the* seen the land a good many years ago.

Q. That was sometime ago?

A. Along about 1890.

Q. Some of the timber has fully matured since then?

A. I don't know about that.

The Complainant re-called F. W. HUMPHREY, who testified as follows:

163 Direct examination by Mr. Eberlein:

Q. Before you made final payment and got your patent had you heard about the trespass case of Sherry vs. the United States?

Defendant objected as incompetent, irrelevant and immaterial.

A. It appears to me I did. I knew about the Sherry case, I was conversant with it.

Q. State whether or not you were in Milwaukee when that case was tried.

A. Yes I was there at the suit, attended the suit.

Q. State whether or not Sherry in fact paid.

A. Yes they won the case and was paid—

Defendant objected as incompetent, irrelevant and immaterial.

A. —I understood \$12 a thousand for the logs that the Indians cut and removed from the reservation.

Q. And it was after that that you completed your payment to the State and got your patent?

A. Yes I think it was.

Q. Did the fact that case went that way have any influence upon you in making your final payment and getting your patent?

Defendant objected same as above.

A. I think it did. All those things had an influence. We had a contract a good many years and paid the State interest and then when all those cases was decides we paid up and took our patent and supposed we owned the land and now would suppose so under those suits. A man collects damage and gets pay for his timber it would look as though he owned the lands wouldn't it. Gosh, I don't
167 know what more a man wants than to pay up on land. I suppose he would have to go there and put his arms around it and hang on to it.

Q. When was the last time you were upon this section?

A. Just a year or so prior to the location of the railroad station at Neopit. I can't give you the exact date. Just a little after we paid upon the land I went up and looked the land over.

Q. What was the character of the timber with reference to being young and thrifty?

A. All thrifty, young green hardwood timber, hemlock and basswood and scattered pine, a thick heavy forest with plenty of moisture on the land to protect it from fire. I considered it in no danger then to let the timber stay there and grow when I saw it.

Cross-examination by Mr. Martin:

Q. As I understand you contracted for the purchase of this land in 1885?

A. About that time.

Q. You have got your contract here.

A. I haven't got it here at present.

Q. Is it in existence?

A. I think so.

Q. You could produce it?

A. I wasn't asked to do so.

Q. At the time you entered into this contract the State assured you they had title to the land?

A. Yes sir.

Q. And the contract provided for partial payments from time to time?

A. No it required we should keep up the interest and pay
168 up at any time.

Q. You never forfeited any interest on that contract you kept paying from time to time?

A. Yes sir.

Q. And prior to the time you got your deed you were not in default of any kind?

A. No sir.

Q. And you didn't pay any differently before or after you heard of the decision in the Sherry case?

A. No sir, not a bit, just the same thing.

Q. Paid before that time as you did after?

A. Yes sir.

Q. You never read the Beecher Wetherby case?

A. No sir I simply heard about it. I am not an attorney I wouldn't know anything about it if I did read it.

The Complainant recalled H. C. HAYTER, who testified as follows:

Direct examination by Mr. Eberlein:

Q. I show you papers marked Exs. 35 to 40 inclusive and ask you if those are original receipts.

A. They are.

Q. And were received by you from the State at or about the date shown on the receipts?

A. Yes sir.

Q. And for payments on the lands described in the receipts?

A. Yes sir.

Complainant offered in evidence Exs. 35 to 40 inclusive.

Defendant objected as incompetent, irrelevant and immaterial.

The Complainant called A. S. NICHOLSON, who being duly sworn testified as follows:

Direct examination by Mr. Eberlein:

Q. You are the superintendent of the Indian Agency for the Menominee Reservation.

A. I am.

Q. As part of your duties have you complete charge and control of the Menominee Indian mill?

A. I have.

Q. Where are those mills located?

A. At Neopit, Wisconsin on the Reservation.

Q. When was that mill built there?

A. By an act of Congress in 1908, the mill built in 1908 and 1909.

Q. How long have you been superintendent and agent at that place?

A. July 1st, 1910, I went in charge of the mill in October 1910.

Q. Do you know the amount of timber that was cut on the reservation and sawed at that mill?

Defendant objected as incompetent, irrelevant and immaterial.

A. I have got a general idea.

Q. About how much has been cut upon the reservation and sawed at that mill?

A. An average of 20 to 25 million feet yearly. Probably the average would be 25 million feet.

Q. That would make almost 200 million?

170 A. 200 million.

Q. That has been cut. Those logs were cut and transported to the mill and sawed?

A. They were.

Q. And the lumber and other building material was sold in the public market?

A. They are.

Q. About how many sections of land have been cut over to get this 200 million upon the reservation?

A. Without having my map before me 40 to 60.

Q. Sections?

A. Possibly it may run to a hundred.

Q. In cutting these sections the idea has been to allow the small timber to stand.

A. Yes sir.

Q. And the large timber has been cut and sent to the mill?

A. Fully matured and blown down.

Q. Down to what size have you taken the pine upon the sections that you have cut?

A. 15 inches.

Q. And the hardwood.

A. From 15 to 12.

Q. And all above that had been cut.

A. Yes sir.

Q. In many places where the small stuff is not very plentiful it has also been cut has it not.

A. Yes sir.

Q. So some sections are pretty well entirely cut.

A. Yes sir.

Q. These lands that have been cut and upon which the young timber has been allowed to remain have been left for purposes of reforesting.

171

A. Yes sir.

Q. Agriculture upon these lands has been pretty scarce.

A. Yes sir.

Q. In 1912 you built several camps upon Sec. 16, town 29-14 did you not.

A. I built a set of camps upon that section.

Q. Logging camps. Have you with you an estimate of the amount of timber that you cut upon Sec. 16-29-14 at that time.

A. I have.

Q. Approximately how much timber did you cut off that section at that time.

A. Section 16-29-14, 159,900 feet.

Q. What class of material was that.

A. Principally hemlock, white pine, hemlock, birch, soft elm, ash, maple, basswood and cedar.

Q. Did Mr. Louis Kemnitz get any white pine off that section.

A. He did.

A. *He did.*

Q. He has purchased certain standing pine to be cut into square timber for shipping purposes has he not.

A. Yes sir.

Q. And the material that he purchased he put into such form and shipped to some eastern sea port and there transported to some foreign country.

A. I couldn't tell.

Q. That was your understanding.

A. I know he loaded on the cars.

Q. And shipped out of Neopit.

172 A. Yes sir.

Q. How much pine did Mr. Kemnitz cut for that purpose.

A. He got 12 trees, 12 thousand feet.

Q. What did the government receive for those 12 trees.

Defendant objected as incompetent.

A. Those trees I haven't with me. They ranged from 55 to 65 that was the first timber we sold and we received different prices. I am not sure whether that was the last price we sold it or not. It ranged from 55 to 65 dollars a thousand.

Q. Will your report help you to get the value of them.

A. Yes the year report will help.

Q. Would it assist you in arriving at the price or amount you got from Kimnitz.

A. It would not.

Q. Best of your judgment what did you receive.

A. 55 to 65.

Q. What became of the other timber you cut from Sec. 16-29-14.

A. Drawed to the mill and manufactured into lumber.

Q. And sold in the market the same as the rest.

A. Yes sir.

Q. When you built those logging camps upon this section you contemplated logging the section the same as other sections.

A. Yes sir.

Q. And using the material to supply the wants of the mill.

A. Yes sir.

173 Q. You also had this Menominee mill planing mills and other mills to manufacture the raw material in every conceivable kind of building material.

A. Yes, sir.

Q. And you manufactured your raw material into various kinds of building material to be sold in the open market?

A. Yes, sir.

Q. That included these logs from Sec. 16?

A. Yes, sir.

Q. In building your logging camps upon that section you intended to make that same use of the timber that you cut upon that section?

A. Yes, sir.

Q. The lands that were cut on Sec.- 16-29-14 that has not been followed by any agriculture, there are no farmers upon that piece?

A. I am not quite sure but what there is one.

Q. On Sec.- 16-29-14?

A. There is one on or either quite close to that.

Q. But no clearing has followed the cutting you did there?

A. No, sir.

Q. In fact all the cuttings you have done on the Reservation you have discouraged agriculture upon the cutting of the lands?

A. Yes, sir.

Q. Mr. Nicholson, when you entered upon this section- 16-29-14 intending to cut the timber for the use of the mill you asserted for the Government that the owners from the State had no title in either the lands or the timber.

Defendant objected as incompetent and immaterial.

174 A. To tell you the truth at that time it didn't enter my mind. No question in my mind at that time as to who owned the land.

Q. Didn't you take the position that the State had no business there at all, that the United States owned the land and timber and everything else on it.

Defendant objected as immaterial.

Q. And you asserted such a claim.

A. Let me get this right, this occurred some time after that question came up at the time you or the agent of the people sent me a letter telling me to stop, prior to that time it never entered my mind.

Q. After you were notified by the attorneys for Hayter and Humphrey then you gave the matter consideration and asserted the Government had full right both to the lands and timber upon that section?

Defendant objected as immaterial.

A. That was my opinion.

Q. And you replied to the attorneys for Hayter and Humphrey that you were going to cut that timber as you saw fit.

Defendant objected as immaterial and not the best evidence.

A. According to the act of Congress.

Q. You would go and recognize no right of the grantees of the State that they had no right to interfere with you wasn't that your position.

A. In substance.

Q. You ceased cutting in December, 1912, how came it that you ceased cutting.

A. I think on an agreement between you and the Indian Office and myself.

175 Q. That is you received instructions from the department to do no further cutting.

A. Yes, it was suggested I do no other cutting in view of the fact that the State would be called upon upon your part to determine the ownership of the land.

Q. Didn't you in fact put the logging camps on Sec. 16-29-14 and threaten to cut all the timber to compel us to bring this suit.

Defendant objected as incompetent, irrelevant and immaterial.

A. I can't answer it the way you put it. That entered in part, the railroad had to go through that land to bring in some timber that

lay northeast of there; that was in 1910-11 when the camp was being established and why it was put on Sec. 16 to cut that timber.

Q. One of the reasons it was put there was to try out that question and make us stop cutting by suit of necessity.

Defendant objected as immaterial.

A. That might be so considered, yes.

Q. Isn't that true that was the claim you made to the department as a reason for putting these camps on Sec. 16.

A. No, that was not claimed to the department but it was on my mind.

Q. To get the question settled.

A. Yes, sir.

Q. Didn't you in your report to Mr. Ayer state to him that you put those camps on there for the purpose of compelling the grantees from the State to go into Court.

Defendant objected as not the best evidence.

A. If I saw the report I could answer it.

Q. I refresh your memory by referring to a part of the report of Mr. Ayer reported in a hearing before A joint Com— of the 176 Congress of the United States, investigating Indian Affairs 63rd Congress, No. 8, in which this language is used, "I started camp No. 15, on section 16 and prepared to cut well knowing that these lumber interests outside would be compelled to go into Court to stop it or yield up their claims", is that the report you made to Mr. Ayer.

A. That is about the burden of it.

Q. And that is about the position that you took. Now, I ask you whether camp 15, is located on section 13-29-14.

A. It is.

Q. Can you tell us approximately how much timber is left upon the Menominee Indian Reservation outside of the School sections.

A. Probably a billion and a half.

Q. What is the class of the timber.

A. Pine, hardwood and hemlock.

Q. You are unable to produce in Court today the letter written by Dewey H. George and letters received by him to and from the Commissioner of Indian Affairs along in the fall of 1897 relative to cutting the timber upon school section sixteen upon the Menominee Indian Reservation.

A. I have not had time to make a proper search.

Q. You will make that proper search when you get back to the office.

A. I will.

Q. And if you find them you will send them.

A. Those are my instructions to deliver them.

Q. Have you in your possession a survey of the Menominee Indian Reservation made by Mr. Tullar showing the Reservation as outlined by the United States in 1852 and 1853.

177 A. I couldn't tell you, I have a number of maps but I couldn't tell you without looking at the maps, my maps don't give the man that made the survey, I didn't copy the name of the person who made the survey.

Q. I show you Complainant's Ex. No. 41, and ask you whether that is a correct photographis copy of the Silas Chapman map of 1855 showing the Menominee Indian Reservation.

A. I am told that it is.

Q. That Silas Chapman map was published by authority of Congress.

A. I don't know.

Q. Where did you see the original map.

A. Either at the public library at Milwaukee or Madison.

Complainant offered in evidence Ex. No. 41.

Defendant objected as incompetent, irrelevant and immaterial.

Cross-examination by Mr. Martin:

Q. Mr. Nicholson, what was your authority for cutting timber on this Indian Reservation.

A. Act of Congress.

Q. What year.

A. 1908.

Q. Now I wish you would just explain in your own words in detail the method employed in cutting this timber and whether or not it was done in the interests of the timber in the future.

A. By an act of congress approved March 28th, 1908, provided or authorized the cutting of timber and manufacturing and selling of lumber on the reservation and the reforestation of the forest of the Menominee Reservation, and the act goes on to say, that the Secretary of the Interior be and is hereby authorized and directed under such rules and regulations as he may prescribe, to cause to be cut and manufactured into lumber the dead and down timber and such fully matured green timber as the forestry service shall designate upon the Menominee Indian Reservation; that no more than 20 million feet of timber shall be cut in any one year, and further provided that this limitation shall not include the dead and down timber on the north half of township No. twenty-nine Range No. 14, East, and the South half of Twonship No. thirty, Range no. 13 East; That the Secretary of the Interior shall cause a mill to be built and operated in accordance with the Act and shall employ such skilled foresters, superintendants, foreman, cruisers, rangers, guards, loggers, sealers and other labor both in the woods and for operating the saw mill as may be necessary in cutting the logs and lumber and in protection of the forest on the reservation; He shall as far as practicable employ none but Indians in forest protection logging and manufacturing; No contract to be sub-let to any white man nor shall any timber upon such reservation be disposed of except under the provisions of this act. Whenever any Indian or Indians shall enter into any contract pursuant to this Act, and shall seek by any agency,

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co-partnership agreement, or otherwise to share in the same with any white man, or shall employ in its execution any labor or assistance other than the labor and assistance of Indians, such act or acts shall thereupon terminate such contract and the same shall be annulled and canceled. Sec. 3, provides that the lumber lath and other marketable materials so manufactured to be sold to the highest bidder for cash.

179 Q. That is all there is in reference to the kind of timber to be cut.

A. That is all, yes.

Q. Now the regulation issued by the Department pursuant to that was along the same line was it not.

A. It was.

Q. You have not a copy of the regulations with you.

A. I have not.

Q. Was that Act of Congress followed and the regulations of the Department carefully followed in cutting this timber.

Complainant objected as a conclusion of law.

Q. Well I will ask you to state what you did under the act.

A. I followed the regulations and the Act and the Act as later amended in 1910, very carefully to see at all times that the regulations were not exceeded or violated.

Q. Was certain thrifty timber on the reservation cut.

A. Only in cases where to leave it would mean loss.

Q. In other words all of the cutting that was done was in the interests of the Forest preserves was it not.

A. As designated by the Forest Service.

Q. You only cut such timber as the Forest Service designated.

A. That is all.

Q. And it was designated by men skilled in that particular line.

A. Yes sir.

Q. With a view of preservation.

A. Preservation of the forest.

180 Q. And is that true with reference to the timber that was cut on sec. 16-29-14.

A. It is.

Q. Now having that policy in mind as stated there in the Act and regulations of the Department was this cutting of the timber prejudicial to the future interests of Forestry Service.

A. Not at all.

Q. You are familiar are you not with lumbering generally and cutting of timber and engaged in that business at the present time and have been for a number of years.

A. Yes sir.

Q. And know what is and what is not in the interests of good husbandry and good forestry.

A. Yes sir.

Q. Was the cutting of this reservation including that cut on section 16 in the interests of good forestry.

A. It was.

Q. Now you have not in recent years cut any timber on any sections 16.

A. No sir.

Q. That was because of the commencement of this action and the rules of the Department.

A. Yes sir.

Q. And that is the only reason you have not proceeded in cutting timber on section 16.

A. Yes sir.

Q. Now, on section 16-29-14, you cut mostly hemlock.

A. Mostly hemlock.

Q. That is the cheapest grade of timber on that land is it not.

A. It is.

181 Q. Was such cutting as was done on that section prejudicial to the future value of the timber on that land.

A. No sir.

Q. Not Mr. Eberlein had you say that you discouraged agriculture on the lands, that was cut over that was also in *in* the interests of the forest preserves was it not.

A. It was.

Q. In order that the timber might not be destroyed.

A. Be a perpetual forest preserve.

Q. What is the present policy of cutting this timber.

A. After the fully matured, dead and down and ripened green timber has been cut over that cutting can be started all over again, that is there would be enough timber reached maturity so it can be cut for lumber and a perpetual forest reserve thereby created a perpetual source of income to the Indians, at the hearings before the Indian Committee the question was discussed and policy laid down by Congress.

Q. What search has been made of your records since you received your subpoena duces tecum, how long did you work at it.

A. I started in approximately at ten o'clock yesterday morning.

Q. Was that the time you received the notice.

A. The first notice came by mail at Neopit and was telephoned to me at Keshena and we started to hunt up such papers as we felt were embraced in that letter. Between 10 and 11 o'clock I was served with a subpoena by the Sheriff of this County, of which I have a copy here, and we at once entered the vaults and started to paw over the old files there and endeavor to get out every paper

182 that had anything to do with it. The files of sixteen years are there and in every kind of condition, not indexed and mixed up for various reasons. The papers have not been called for during these years and there was no order and simply you had to sit down and every paper and document taken one by one and see whether it had any reference and if so lay it aside.

Q. There was no specific letters called for.

A. No sir.

Q. You did your best to comply with the request.

A. I did my best to comply with the request and brought with me such material as I could get. I had no idea and papers was wanted

in 1897 and the search was not completed when I left about quarter to nine this morning. We worked late at night and commenced early again this morning.

Q. You heard Mr. George testify on the Stand that money had been paid by the Oconto Company and likewise the Hollister Amos Company for the timber cut under the contracts with those company's.

A. I did.

Q. State whether you know in your official capacity whether that money was actually paid or whether the money was placed in escrow.

A. It is my impression that the money was held in Escrow.

Complainant objected and moved the answer be stricken out.

Q. That is the impression you gathered from your records in your office.

A. Yes sir.

Complainant objected as immaterial and moved the answer be stricken out.

Redirect examination by Mr. Eberlein:

183 Q. Mr. Nicholson, Section 16-30-15 is largely a pine section.

A. It is a pine section.

Q. Is it not a fact that on lands where the pine is as thick as it is on that section that there is practically no other timber.

A. The percentage is about half and half, about one half pine and one half principally hemlock.

Q. Is it not a fact where this pine grows that there are very few other trees among the pine, when you take the pine off you have a barren space of land.

A. Pine land is usually pine land.

Q. And nothing will follow.

A. Yes, hemlock will follow pine.

Q. But when the pine is removed hemlock and hard wood that will follow is of very small value as compared with the pine.

A. Generally speaking it is so.

Q. Did I understand you to say that after you cut off this 160, thousand on this section 16-29-14 that what remained was just as valuable as it was before you cut any at all.

A. What remained was just a valuable.

Q. As before you cut any.

A. Not that particular moment but would be in the course of years.

Q. In other words you don't want to be understood to testify here that the timber was worth as much after it was cut off as it was before you started to log do you.

A. That can be answered two ways. If the fully matured timber was past the age of maturity and was going into decay and taking it was saving or giving the rest of the young timber a chance to reach

light and air and increase in value the leaving of it simply
184 would mean the young timber was left in the dark, and retard
its growth and it would not reach maturity, it wouldn't have
a chance.

Q. Is it not a fact, after you log off a section like Sec. 16-29-14
you take the timber that you say you were going to take that you
have practically destroyed the value of that section.

A. It is not.

Q. Is it not a fact after you have logged the timber such as you
claim you intended to log that what remains wouldn't be worth ten
dollars an acre.

A. No. That is not so.

Q. Is it not a fact that a hundred years, would not produce tim-
ber as valuable as what you take off.

A. Yes it would take a hundred years to reproduce the same
trees.

Q. And on sections having large amounts of pine you would never
get by such cutting the growth of timber or any where near the
value the section was with the pine on it before you started cutting
isn't that true.

A. I couldn't possibly answer that, take seven hundred years to
answer that.

Q. You know the kind of trees that follow pine are of little or no
value as compared with pine.

A. The kind of trees that came off section 16 were very little value
with the exception of 10. They were over matured and full of worms
and were decaying and rotten, in places tops broken off by the wind
and dead; there were 10 live green trees that made fine timber.

Q. What section.

A. 16-29-14.

Q. What about 16-13-15 that is strictly pine timber.
185 A. That is over matured pine timber and should be cut
within five years to get the money out of it.

Q. That is all green pine timber.

A. Yes, principally live pine timber.

Q. It is as good a quality as any where on the Reservation.

A. It is.

Q. And you say you couldn't tell in seven hundred years whether
that section would ever again be as valuable for timber as it now is.

A. You are asking me a pretty complex question. Pine might be
worth a thousand dollars a cubic inch and in time it would be more
valuable, I cannot tell what the future value of pine will be.

Q. You would never expect to have the quantity of pine on that
section again that there is there now.

A. In the system of reforestation we would have a greater quan-
tity.

Q. How many years do you figure to get a growth on that section
as great as you have now.

A. Not less than two hundred and fifty.

Q. How long before you could go there and cut off pine as valu-
able as there is there now.

A. That would be answered by the previous answer, I have only got what the scientists say.

Q. That it would be 250 years.

A. At least.

Q. The cutting that you did was authorized in accordance with the forestry expert.

A. It was.

Q. Did the forestry experts go on the land and mark the trees?

186 A. Not those particular trees.

Q. Is it not a fact Kemnitz goes over that reservation where ever he will and takes any tree he wants if he pays you the price.

A. That is not so.

Q. On sec. 16-29-14 Kemnitz is the only one allowed to say what certain trees shall be cut by him.

A. No sir.

Q. Did you go there and see the trees that were cut by him.

A. Decidedly so.

Q. But no other person.

A. The representative of the Forestry Service and my logging superintendent also.

Q. Kemnitz got all the trees he wanted.

A. He got ten trees off that section.

Q. That is all he wanted.

A. That is all he could get out of the designated territory.

Q. Was there more there.

A. Yes there was more there.

Q. I thought you said there *was* only ten trees on the whole section.

A. Mr. Kemnitz took ten trees because they were along the right of way, the right of way was blazed and marked, the Forestry Service had designated certain sections on which trees of a certain diameter could be cut and no other. Mr. Kemnitz went along and made a selection of trees he wanted to take and he had to take those trees whether good or bad, there *was* but 10 trees he could take and he paid us the stumpage value of those he felled and didn't take,

187 they were over mature.

Q. How many trees did he fall in all on this sec. 16-29-14.

A. I can't give you the exact number because it is embraced in a scale of 58 pine logs. I would say there was possibly 20 trees.

Q. And how many thousand did the Government receive pay for from Mr. Kemnitz.

A. The Government received pay for pine timber for 10 thousand feet.

Q. How large were those trees he cut.

A. I didn't bring those particulars with me.

Q. They were very large were they not.

A. I can answer this way. They are supposed to have an average of 42 cubic feet, some little shorter, some might be 45 feet, 47 feet, but an average of 42 feet was to be maintained in the logs taken off.

Q. Did he take 10 thousand cubic feet.

A. Log feet, board feet, 10 thousand log scale.

Q. But he was compelled to pay for those was he not, so it would require only 30 per cent more board measure in a log to make such timber as you describe.

A. There is no loss in making this square timber, the slab is taken off in the mill.

Q. Is it not a fact after you go in and cut this timber there is danger of forest fires thereafter.

A. No sir.

Q. Do you cut all the underbrush.

A. Burn the soft wood and scatter the hardwood.

Q. What disposition did you make if any of the brush on section 16-29-15.

188 A. If I remember rightly it was undisposed of because all operations ceased there.

Q. Is it not a fact the brush on that section was left right where it was cut.

A. Not all of it because I first attended to the burning in the immediate neighborhood, there was some left because we were instructed to cease operations so far as operations on that section was concerned.

Q. After logs are cut from Government lands and timber sold what do you do with the money.

A. Deposit it with the Treasurer of the United States. I suppose it goes to the Indians.

Q. And you draw upon that same fund to pay your logging operations and expenses of the mill.

A. From the sale of lumber?

Q. Yes.

A. No.

Q. Do you have a special fund for that.

A. Yes the Menominee Log Fund.

Q. Don't you place in the same fund the money you receive from the sale of your product.

A. I couldn't really tell you I can only think.

Q. I say just when and how the—replenish that fund.

A. The Act provides that the net proceed- shall be placed in a new fund and I imagine the process is to take out the cost and the net proceeds go into the Menominee four per cent fund in accordance with the Act, I don't know just what process it goes through down at Washington.

Q. Have you any correspondence in which the term "Wolf River Falls" was used, where is that point, the falls of Wolf River.

189 A. I couldn't exactly say myself, only what I have been told, Keshena Falls.

Q. The correspondence also speaks of a saw mill built on the falls of the Wolf River, is there any question but what that is the present location at Keshena Falls.

A. I have been told there was another build- further south on the river.

Q. I mean above Shawano here.

A. Above Shawano here, there is only the agency mill.

Q. You- understanding is and from conversations with the Indians there is no question but what the Falls on Wolf River is the Keshena Falls.

A. They always called it Keshena Falls, I never heard it called the Falls of Wolf River.

Q. That is how far above Keshena.

A. I should think a mile and a half.

Q. Is it not a fact, Wolf River never enters through ranges 13 and 14 of the Menominee Reservation.

A. Yes sir.

Q. The river runs through range 15 through out the reservation.

A. I think so. Yes sir.

Q. Mr. Nicholson, is it not a fact that Mr. Kemnitz took off this pine after December 1912, when the Department agreed to stop cutting.

A. I can't give you the definite date that that was taken off.

Q. But after.

A. Oh, no.

Q. Nothing was cut after the Department ordered stopping.

190 A. No, the cutting took place before. In fact I think the cutting took place during the summer or early fall.

14. Q. Have you ever been over to camp 15 on section 16-29-

A. I have.

Q. How many acres have been cut there.

A. That I couldn't say off hand.

Q. About 7 or 8 acres.

A. Yes.

Q. Is it not a fact that where you did cut on sec. 16-29-14 that you cut it clean.

A. In the vicinity of the camp it was cut clean.

Q. That is as far as you got when the Department agreed to stop cutting.

A. Yes sir.

Q. And you figure about 7 or 8 acres was about the right number of acres cut over on sec. 16-29-14.

A. I wouldn't want to say definitely as to that without actual measurement.

Q. What is your best judgment.

A. I have not walked over the immediate vicinity or camp 15 since we closed it down. I get so much detail and other stuff in my mind that I let it go out of my head until I want it and then look up the records.

Q. Is it not a fact there was no practical reforestation done until you took charge of that Reservation.

A. You mean artificial reforestation or natural?

Q. Artificial.

A. I couldn't find any artificial reforestation.

Q. Is it not a fact before you came to that Reservation that where they cut the timber from Government lands they cut the timber the

same way as loggers did, cut it clean everything that was merchantable.

191 A. No that is not a fact, every single tree was marked.

Q. Before you came to that reservation.

A. Yes and they didn't then take all the trees that were marked.

Q. But there was no effort at artificial reforestry before you came to the reservation.

A. Not to my knowledge.

Q. What success have you had with your reforestation since you have been on the reservation.

A. Considered very successful.

Q. A very slow proposition is it not.

A. You know how a tree grows, it grows as fast as can be expected.

Recross-examination, by Mr. Martin:

Q. What is being done in connection with reforestation.

A. By selected cutting and using care in the felling of the trees the young forest coming up below it is saved as much as possible so there will be natural reproduction, in addition to that we are operating a nursery where we raise the young plants and at the proper ages, either three or four years, we replant them in the Districts where we have cut or where fire has gone over it; in addition to that we purchase from the best source possible thousands of plants between three and four years old, and transplant them.

Q. What efforts have been made to prevent the destruction of trees by worms.

A. We fight the efforts of the pine weevil where we discover it.

192 Q. Do you do that with reference to all the lands on the reservation.

A. All the lands on the reservation.

Q. Is the pine weevil bad in that vicinity.

A. Pretty bad.

Q. Now you testified it would take a large and mature pine tree about 250 years to reproduce, that is not true with reference to the other timber on the land.

A. No sir.

Q. That has only reference to the pine.

A. To the pine, under our system of cutting and selling.

Q. Now, what other timber is growing on this reservation.

A. Hemlock, and all the hard woods.

Q. Do they reproduce much more rapidly than pine.

A. Yes, they reproduce much more rapidly.

Q. Do you know or have you any way or knowing how long the Menominee Indian Tribe has existed in this Country.

Complainant objected.

A. History tells me they were here when the first white man came down in the great west.

Q. What year was that.

A. In the early part of 1600.

Q. You know of no way of determining how long they have in fact existed as a tribe.

A. I have not.

Q. So far as you know they have existed from time immemorial.

A. From the time of the flood.

Q. Are they increasing or decreasing.

A. Increasing.

Q. There is no reason to suppose that the tribe will cease to exist for a good many years yet is there.

A. No sir.

Complainant moved to strike out the answers to the last four or five questions as incompetent, irrelevant and immaterial.

Q. Assuming that the timber on this reservation was not cared for in the manner which you have described it is now being cared for say for a period of one or two hundred years what in your judgment would be the condition of the timber at the end of that time if no attention was paid to it and it wasn't cut and wasn't looked after generally.

Complainant objected as incompetent, irrelevant, and immaterial. No proper foundation laid.

A. With the aid of the elements and fire the forest would entirely disappear.

Q. Under the present system of caring for the timber and re-forestry do you consider that the timber will continue to exist and be valuable for a hundred years probably to come.

A. I do.

The Complainant called H. G. WEBER, who being duly sworn, testified as follows:

Direct examination, by Mr. Eberlein:

Q. Do you reside in the city of Chawano.

A. I do.

Q. What is your business.

A. Abstract and real estate business, timber cruiser.

Q. For how long have you been engaged in that business.

A. 25 years.

194 Q. As a part of your abstract work is it necessary for you to acquaint yourself with the records of the County treasurer's office.

A. Yes sir.

Q. In the county treasurer's office do you find the books of each town treasurer showing the taxes assessed and charged to all the tracts in Chawano County.

A. Yes they are all there but a few that are missing that cannot be found.

Q. Have you examined the County Treasurer's books of Shawano County to ascertain whether taxes have been collected by both State,

County and town tax upon sections sixteen, Shawano County within the limits of the Menominee Reservation.

Defendant objected as incompetent, immaterial, irrelevant, and not the best evidence. Objection as not the best evidence withdrawn and objected to as immaterial.

Q. You have examined the books back as far as 1885.

A. Yes sir.

Q. What is the fact whether those sections have been assessed back that far or not.

A. Nearly all of them have been assessed and taxes collected each year, there are a few forties in sec. 16-30-15, that were not assessed.

Q. The parts that belonged to the State of Wisconsin have not been assessed.

A. No sir.

Q. Have you been on any of the school sections 16 of the Menominee Reservation.

A. Yes sir.

Q. How many different ones have you been on.

A. I have been on all of them.

Q. You may state whether or not any of those sections 16
195 are mineral lands.

A. No sir they are not.

Q. Wherein lies the value of those sections.

A. Principally in the timber.

Q. After the timber is removed what in your opinion would be the fair value for the land remaining.

A. \$5 an acre.

Q. On the sections 16 that you have visited did you ever see any Indian farm or any Indians living upon those sections.

A. No sir, I never saw any. I think there is a residence on section 16-28-13. I am not sure that he is on Sec. 16, if he is not he is right near it.

Q. Just a house.

A. He has got a little clearing on the bank of a lake. I don't know where that corner is. I want to correct my testimony, there is some settlers on Sec. 16-28-15, but there is no timber on that.

It was stipulated that Exs. 42 to 49 inclusive and Ex. 74 purporting to be abstracts of title to certain lands in the school sections in the Menominee Reservation made be offered and received in evidence as prima facie evidence of the official records of the Counties of Shawano and Oconto as to the title and instruments affecting the title in lieu of the original records themselves, subject to any and all objections that the original records would themselves be subject to, and with the understanding that either party may offer the original instruments or the original records of the instruments shown on the abstracts to correct or change *show* showing on the abstracts or any therein.

196 It was further stipulated and agreed that the patents referred to in these abstracts from the State to the various grantees are the same as Complainant's Ex. No. 5, subject to

the same conditions that either party may show the original patents to show any differences therein.

Cross-examination, by Mr. Martin:

Q. As I understand Indians do live on some of the sections 16 in this reservation.

A. Two of the sections.

Q. Which two.

A. Sec. 16-28-15 and Sec. 16-28-16.

Q. From your examination of the records in the County Treasurer's office did you find all of the sections 16 in this Indian Reservation were assessed for taxes.

A. With the exception of a few forties. They are not assessed until after the State parted with its title.

Q. When did you make your examination.

A. This forenoon.

Q. That is the only information that you have to the effect that the State has not parted with its title to those few forties that you refer to.

A. The State did part with its title later on.

Q. Then from your investigation the State is not the owner of any of the lands in sections 16 in the Menominee Reservation.

A. Yes *they are* the owner of two sections I think, two full sections.

Q. Those two full sections are not assessed for taxes.

A. No sir.

Q. Do you recall which sections they are.

197 A. 28-15 and 29-16.

Q. Now your conclusion that the State is still the owner is based upon your investigation of the records in the County Treasurer's office.

A. No sir, from the records in the Register of Deeds office.

Q. Where the conveyances are recorded.

A. Yes sir.

Q. Whether the State has in fact entered into a contract for the sale of those sections or has actually conveyed them by patent which has not been recorded you are unable to say.

A. I am not.

Redirect examination by Mr. Eberlein:

Q. Those residents on 28-15, what are they, farm homes or just simply little shacks.

A. A fair average Indian farm, a small clearing around a house.

Q. About how large.

A. Oh, from one to four acres.

Q. How many are there.

A. I wouldn't be certain, I think there *is* three on that one section in 28-15, three or four.

Q. Near town.

A. About 3½ miles from Keshena.

Q. How far from Neopit.

A. 9 miles, in the neighborhood of 9 miles.

The complainant recalled A. S. NICHOLSON, who testified as follows:

198 Direct examination by Mr. Eberlein:

Q. On Sec. 16 in 29-16 there are two Indians there, is that correct.

A. No there *is* more lives on 29- 28-16.

Q. Two Indians live on that.

A. Two clearings there.

Q. How long have they lived there if you know.

A. Since the Indians first gathered there, that was their first gathering place.

Q. How many years ago.

A. Many, many years ago.

Q. On 28-15 there are seven Indians living.

A. 7 Indian families.

Q. And they moved in there many years ago.

A. Yes, probably or possibly 70 or 80 years ago. Some of them born there.

Q. There are no Indians living on the other sections 16.

A. I wouldn't like to state definitely. I think there are two sections that have families. I would like to make sure from the record. I have nothing here to refresh my memory, they would be 30-13 and 29-14. I have something indefinite here about 29-14.

Q. There is no clearing on 29-14 is there.

A. If I had the record I could tell you. There is a log cabin kind of tumbled down now with half acre of clearing.

Q. Not positive whether that is on that section or not.

A. I am not, I am reading from an old Indian's testimony. He says it is on there and I am not quite sure whether it is on
199 or just off.

Q. Now those clearings on these places are small clearings from one acre to two acres.

A. The average is between 5 and 20 acres.

Q. As large as that.

A. You can know that yourself because you have seen them.

Q. I have never noticed them.

Cross-examination by Mr. Martin:

Q. The Menominee Indians were formerly divided into Indian bands were they not.

A. They were.

Q. Were there any bands around Lake Shawano, do you know that of your own knowledge.

A. From the testimony of the Indians, from the records of my office I would know.

Q. Complainant objected as heresay and not the best evidence.

Q. Base your testimony upon what the records of your office show, was there a band of Indians that lived in the neighborhood of Lake Shawano.

A. There was.

Complainant objected as incompetent, irrelevant and immaterial and moved the answer be stricken out as not the best evidence and hearsay.

Q. Did some of the Indians reside in 1848 and 1850 on what is now the present reservation.

A. They did.

Complainant objected for the same reason and moved to strike the answer out.

200 Redirect examination by Mr. Eberlein:

Q. Where did you get that information.

A. From the testimony taken of the old Indian in tribal council.

Q. That is the only information you have.

A. I have seen the occupancy myself.

Q. You wouldn't know how long those Indians have lived there from merely looking at the improvements they have made.

A. You can tell very nearly.

Q. You are merely guessing at that.

A. Why something that experience gives to you.

Q. What council are you referring to.

A. Tribal council.

Q. When and where held.

A. At Keshena, Wisconsin, the times I would have to get the dates. I think I can give you the date here. One in particular of August 25th, 1913, during that week and several before that time that I have not now the dates with me.

Q. In other words do I understand you you are basing your evidence to the effect that those Indians were on this reservation in 1848 upon what somebody told you at the tribal council meeting of 1913, is that where you get your information.

A. On the testimony of the Indians in the tribal council.

Q. You heard them say so.

A. Yes, and taken down officially.

Q. They told you.

A. Yes.

Q. And you are relying upon that to satisfy you that they did live here before and at the time of 1848.

201 A. And a visit to their domiciles to see whether there is any evidence in the age of the houses they occupied that would tend to back it up.

Q. Could you tell whether the house was built in 1850 or 1848.

A. I could tell whether it was 25 years old or 50 years old.

Q. You wouldn't be able to tell from looking at a log house whether it was built in 1853 or whether it was built in 1848.

A. I couldn't say the exact year no sir.

Q. It would be mere guess work, isn't that true.

A. My estimate yes.

Q. So as a matter of fact you couldn't tell from that within 5 or 10 years of when the house was built.

A. I couldn't say no sir.

Q. So when you say that you are satisfied they were up there in 1848 from the appearances of their improvements and buildings that is pretty much guess work.

A. I would know they were built before that time.

Q. Do I understand you to testify there are some up there built before 1848.

A. Yes sir.

Q. Where are they.

A. The old house of old Wesh-Ans Kuet.

Q. That has the appearance of being a very old building.

A. Yes sir.

Q. Is it not a fact that he moved up there in October, 1852.

A. Yes he moved there about that time.

Q. Is that the time he built the building.

202 A. He says it was built by his grandfather.

Q. What was his name.

A. I have not a thing here to remember whether it was To-waesota or not.

Q. All you know about the age of that particular building is what somebody else told you.

A. And my own judgment.

Complainant moved to strike out the testimony of Mr. Nicholson with reference to the time that the Indians occupied the Indian Reservation for the reason that it is incompetent, and hearsay.

By Mr. Martin: The proceedings of the Tribal Council to which you refer are a part of the records of your office.

A. They are.

By Mr. Thompson: We ask also to strike out the testimony with the tribal proceedings because the witness' testimony is not proper reference to evidence thereof.

By Mr. Eberlein: Did you ever see the minutes of a council meeting at the Falls of Wolf River in November, 1852.

A. No sir, I have not.

Q. Are you not informed from the original minutes on file in your office that that was the first meeting every held by the Indians on that Reservation.

Defendant objected as not the best evidence.

A. Those minutes are not in my office.

Q. You have never seen them.

A. I have never seen them the agency wasn't there at that time.

203 Q. Upon what section is this house that you refer to located.

A. Sec. 16.

Q. This house that you claim was built in 1848.

A. 28-15.

Q. 16-28-15.

A. Yes sir.

Q. How far is that from Keshena.

A. Possibly three to four miles.

Q. What direction.

A. Going towards Neopit.

Q. Northwest.

A. Practically northwest, there are other houses that show much greater age on 28-16.

The complainant then called LEN DODGE, who, being duly sworn, testified as follows:

Direct examination by Mr. Eberlein:

Q. You live in the city of Shawano.

A. Yes sir.

Q. How many years have you been engaged in logging and cruising.

A. 20 years.

Q. Did you examine Sec. 16-29-14 in the last week.

A. Yes sir.

Q. What if anything did you find in the way of logging camps upon that section.

A. I found a set of camps.

Q. What kind of camps logging camps.

A. Yes built for logging purposes I should judge. Some
204 frame camps, and one large building built out of logs.

Q. Regular set of logging camps.

A. Yes sir.

Q. Did you find any timber having been cut.

A. Yes sir.

Q. How much land in acreage was cut over.

A. Why I should judge about 7 1/4 acres.

Q. Did you find those camps on this section 16.

A. Sec. 16-29-14.

Q. What is the character of that cutting with reference to cutting it clean or just cutting here and there.

A. Why it was cut clean so far as I could see with the exception of back of this clearing that was cleared off for camp purposes of course it was clean and back and west from this cutting there had been some timber cut, but I should judge that timber was cut for building purposes, the undergrowth and timber taken out.

Q. For building camps.

A. Yes for building camps.

Q. This identical camp.

A. Yes, this camp I should judge.

Q. Was any of the land in this 7 to 8 acres improved or agricultural lands.

A. Not that I could see.

Q. On examining this school section 16 did you have an opportunity to observe the land immediately to the west and to the north that had been logged over.

A. Yes I traveled over it, I traveled over the land west of this section.

Q. About how much land did you have an opportunity to observe to the west and north of this school section that had been cut over.

205 Defendant objected as immaterial.

A. I should judge anywhere from half a section to a section.

Q. You may tell us the character of the cutting that was done on that land, how it was cut.

Defendant objected as immaterial.

A. Why it was cut clean practically so far as any logs was concerned.

Q. You may state whether or not it was about the same kind of cutting that an ordinary white logger would do.

A. Yes, it was to a certain extent although there was logs taken I think that an ordinary white logger wouldn't take.

Q. In other words you figures they cut it cleaner than an ordinary white logger.

A. Yes, I think it was.

Q. What about leaving ordinary pine trees under fifteen inches, were they left on those lands, you saw to the north and west of school section 16.

A. No, I don't think so.

Q. Was there anything left.

A. There was a little.

Q. What kind of stuff was it.

A. Well I refer to one small pine tree to the north standing at the edge of a swamp where it was left.

Q. That is the only tree.

A. That is about the only pine tree that I could see; I wasn't looking particular but that was the only pine tree I think I saw.

Q. Was there any other trees of any kind around that pine tree.

A. Around that tree there wasn't much of anything.

206 Q. You would call it pretty well logged out.

A. Well, wherever they could get it I should figure it was logged off, yes, I didn't think there was anything much left.

Q. How close do good loggers cut that class of timber down to how much.

A. Oh, they are cutting that timber down to six inches and less than that; 5½ hemlock and pulp.

Q. And you figure that timber there was cut as close as that.

A. I didn't see it there.

Q. You went through it and saw it.

A. I took an old road and went up around there and went back across the line and I didn't see much green timber there; it wasn't standing there any way on that piece of ground that I crossed.

Q. You found evidences of certain large pine that had been taken from 16-29-14.

A. Some, yes.

Q. How many in particular did you find.

A. Well, I found four pine that I could find the tops of and the stumps.

Q. Are you able to scale a pine tree where you find the tops and stump.

A. Why, yes, we took the measurement of the stump and length.

Q. Mr. Silas Pendleton and Charles Tourtelot *with* with you.

A. Yes, sir.

Q. What did those four pine trees scale according to you- best judgment.

A. Well I have that scale, I haven't it in my head; I have
207 it here on paper somewhere; those four trees scaled 12,840 feet.

Q. How big were the stumps.

A. The stump of one tree was 41 inches, the top 16 inches, the length 110 feet.

Q. What was the other one.

A. One was a 34 inch stump, 110 feet, ten inch top, one was 35 inch stump, 100 feet, 14 inch top, and one 36 inch stump, 98 feet long and 16 inch top.

Q. And the aggregate of those 4 was 12 thousand feet.

A. 12,840 feet.

Q. There was considerable snow on the ground when you made this estimate.

A. Considerable snow on the ground.

Q. Those are the only four you found the tops.

A. I found the stumps of others but I didn't *fund* no tops. I couns a heap of snow and I would dig down with my hatchet and find the stump but I didn't find no top.

Q. The great value of these lands, you looked at is in the timber.

A. Yes, sir.

Q. After you remove the timber the land is of how much value.

A. Oh, I should think 5 or 10 dollars an acre.

Cross-examination by Mr. Martin:

Q. These pine trees that you speak of were they mature or young growing timber.

A. I should judge they were about matured.

Q. And I understand you to say that good loggers cut down to
5½ inches.

208 A. In the hemlock.

Q. What in Pine.

A. I guess in pine too so far as that part is concerned.

Q. Did you find any trees or see any evidence of any having been cut down as low as that on Sec. 16.

A. No, I didn't.

Q. Didn't find any.

A. No, I didn't.

Q. Practically there wasn't any cut down to less than 12 inches was there.

A. At the stump?

Q. Yes.

A. Not that I saw.

Q. And I understand you to say that the acreage that was cut was evidently for the purpose of building camps.

A. Why not altogether.

Q. It was also for the right of way of the Indian railroad through there was it not.

A. Some of it; there was some cut that I didn't think was cut for camp purposes.

Q. And that was cut for right of way purposes.

A. No I don't think so.

Q. That is the way it appeared to you at the time.

A. There was a piece cut out of a cedar swamp there that the cedar timber was cut and birch and ash.

Q. It wasn't cut in the same way that that west and north was cut was it.

A. This in the swamp?

Q. No, this on Section 16.

A. Why away from these camps, yes. Yes, cut practically the same.

Q. But not as much acreage.

209 A. No, not as much acreage.

Q. Don't you know Mr. Dodge that was cut in there for the purposes of the camp and for the right of way of the Indian Railroad.

A. I don't know that.

Q. Well that land that was cut was just about ample for that purpose wasn't it.

A. I would think it was more than that.

Q. Not very much more than that.

A. Oh, yes, there was considerable. I saw where the logging camp was built and built mostly of hemlock. I couldn't see any other material in the camp. Lots of cedar cut and ash and pine off of other land there.

Q. Did you see any protection to the forest from fire.

A. Yes.

Q. About how far from the camp did you see that.

A. Oh, we don't usually clean it more than 50 or 60 feet around the camp.

Q. Would you consider that distance sufficient in view of the conditions on the Menominee Reservation.

A. No, that was cut further.

Q. You think the cutting that was done was more than necessary for that purpose.

A. Yes.

Q. And for the right of way.

A. Yes, sir.

Q. How much more.

A. Oh, there was perhaps 5 acres, 4 or 5 acres.

Q. You estimated $7\frac{1}{4}$ acres.

A. Yes, sir.

Q. Did you measure it.

210 A. As near as I could.

Q. What measurement did you use.

A. I had my men that did the measuring measure it off.

Q. With a tape line.

A. Yes.

Q. Did you measure it yourself.

A. I helped to measure it.

Redirect examination by Mr. Eberlein:

Q. I believe there is one question that I don't understand; as I understand you to testify that on Sec. 16 where this 7 acres was cut no tree under 12 inches in diameter was cut.

A. Oh, no; there is trees less than 12 inches that was cut.

Q. You wish to correct your testimony.

A. Yes, I understood him to say pine.

By Mr. Martin: None of the pine under 12 inches was cut.

A. None of the pine.

Q. How about hard wood.

A. But the other wood, yes. I saw a number of trees cut.

Q. Down to what.

A. Down to I should think 6 or 7 inches.

Q. Your first estimate was $5\frac{1}{2}$ to 6 inches.

A. Yes, $5\frac{1}{2}$ to 6 inches.

Q. You didn't find anything of any kind cut below that.

A. Nothing more than brush.

211 By Mr. Thompson: That cutting down to $5\frac{1}{2}$ and 6 inches that you testify to was the way the loggers log for lumber companies, that is the way they log isn't it.

A. Yes.

Q. That had no reference to any question of forestry, that had reference to getting all the timber off didn't it.

A. I suppose so, yes.

By Mr. Eberlein: Did you see any pine trees standing on this 7 acres that was cut over that was 12 inches, less.

A. Standing?

Q. Yes, or around there at all.

A. No, there was none right in the cutting; there was some standing at the edge.

Q. If there was any there 12 inches and under they must have been cut too.

A. They must have been.

By Mr. Thompson: You mean you didn't look all around in the snow for all trees.

A. No the snow was too deep.

By Mr. Eberlein: You don't know whether they cut pine down to 12 inches or not because you don't know what was on it.

A. No, sir, I don't know what was on it.

Q. You know there is nothing left there now 12 inches or anywhere near 12 inches.

A. No, sir.

By Mr. Martin: You don't know for what purpose this
212 small timber was cut do you.

A. I don't.

Q. Whether for fire wood or for logging.

A. I don't.

The Complainant called SILAS PENDLETON, who being duly sworn testified as follows:

Direct examination by Mr. Eberlein:

Q. You live in the town of Westcott, Shawano County.

A. Yes, sir.

Q. How long have you been engaged in logging and cruising lands.

A. 40 years.

Q. How old a man are you.

A. 71.

Q. Did you in company with Len Dodge and Mr. Tourtelot examine school section 16-29-14.

A. Yes, sir.

Q. What did you find on that section with reference to logging camps.

A. We found a logging camp there.

Q. How much land had been logged off that particular section.

A. The whole amount or just where the camps were?

Q. No, the whole amount that was cut over.

A. About 7 acres or near that.

Q. What was the kind of cutting that had been done there with reference to cutting it clean or just taking out the big mature trees.

A. It was cut clean or in the manner that the ordinary logger would cut.

213 Q. In making this examination did you find those 4 trees about which Len Dodge has testified.

A. Yes, sir.

Q. Did you hear him testify as to the thickness and dimensions.

A. I did but my hearing is not first rate. I suppose he has got them on paper. I helped him measure.

Q. Do you remember that the aggregate estimate of the timber in those four trees was over 12 thousand feet.

A. Yes, sir.

Q. That in your opinion is correct.

A. Yes, sir.

Q. Do you remember that one of those stumps was 41 inches.

A. Yes, sir.

Q. Did you have occasion to examine the land to the north and west of this school section that was cut upon.

A. I didn't have occasion to examine that but we worked on that land on both sides to the north and west. We could see out through the cutting.

Q. How much land did you conveniently see to the northwest of this section.

Defendant objected as immaterial.

A. Well the distance would vary.

Q. About how many acres in the sections did you see there that had been cut over to the north and west.

Defendant objected as immaterial.

A. I should judge that we could see in places from 80 to 100 rods and other places not so far.

Q. What was the character of the cutting done on these lands to the north and west.

Defendant objected as immaterial.

214 A. They were cut as an ordinary logger might cut them.

Q. An ordinary logger.

A. Off of the reservation, yes.

Q. An ordinary logger when he cuts land takes everything off that is merchantable.

A. Yes.

Q. He does not consider whether that piece of land will ever again produce a crop of trees or not.

A. I don't think so.

Q. He logs to cut everything he can off from it.

A. Yes, sir.

Q. And you figure this cutting to the north and west of this section was cut the same way.

A. Yes, so far as I could see.

Q. And this seven acres on this Sec. 16 was also cut about that same way.

A. Yes, sir.

Cross-examination by Mr. Martin:

Q. There was a camp on section 16 wasn't there.

A. Yes, sir.

Q. This cutting of 7 acres on Sec. 16 might have been for camp purposes and purposes of right of way might it not.

A. Not all, no, sir.

Q. About how much would be necessary for that.

A. In my estimation there was $2\frac{1}{4}$ to $2\frac{1}{2}$ acres cut for camp purposes.

Q. And that is allowing for the distance away from the camp to prevent fire.

A. Yes, sir.

Q. Was there any small timber cut on this Sec. 16.

A. Yes, sir.

215 Q. Down to what size.

A. Why it was cut down to 5, 5½.

Q. You were not there when it was cut.

A. No I wasn't there when it was cut.

Q. You don't know whether it was cut by the loggers or cut by the Indians for fire wood purposes of your own personal knowledge.

A. I was there after the timber was cut in the fall it was piled up on the right of way at the time or a part of it was.

Q. But a part of the small timber might have been cut by the Indians for fire wood.

A. Not in my opinion it was not.

The Complainant called CHARLES TOURTELOT, who being duly sworn testified as follows:

Direct examination by Mr. Eberlein:

Q. Where do you live.

A. Neopit.

Q. Are you on the Menominee Indian roll.

A. I am.

Q. Have you lived there for the last 15 or 16 years.

A. I have lived on the Reservation about 17 years. I was away about 5 years. I have lived there about 12 years.

Q. Did you in company with Len Dodge and Silas Pendleton help cruise Sec. 16-29-14 in the last week.

A. I did.

Q. Did you find a set of logging camps on this section the same as they have described.

A. I did.

216 Q. Did you find about 7 acres of land that had been cut off on that particular section.

A. Well we called it about 7 acres.

Q. Is that about right in your judgment.

A. As near as we could get at it the way we had of measuring it.

Q. How was that cut.

A. Well right where the shanties and barn were it was cut pretty clean but there was timber taken out, trees here and there, looked to me as though they had taken out stuff for a barn, nice straight hemlock and then there was a little patch of cedar, I called it cut clean.

Q. Would you say the entire 7 acres was cut about the same as ordinary loggers would cut it.

A. I should — so yes sir.

Q. Did you have occasion at this time and other times to observe the cutting done on lands to the north and west of this particular section.

A. I have.

Q. State in what manner that logging was done.

Defendant objected as immaterial.

Q. What kind of cutting was done there.

A. That has been cut clean.

Q. Same as ordinary loggers would cut.

A. Well a little cleaner than most loggers.

Q. What if anything remained of merchantable timber on that land north and west.

A. Very little remained but scrub cedar and small tamarack rather hard to get out by a logger.

Q. What if anything had been done on these lands to the north and west with reference to making it into farms.

A. I don't know. I guess nothing.

217 Q. Any farmers living upon it.

A. No, not yet.

Q. Have you made trips to the Evergreen from Neopit.

A. Yes sir.

Q. Have you passed over lands on the Evergreen.

A. I have.

Q. What is the condition of the cutting.

A. It is all cut clean, nothing left there.

Q. Has any of that land on the Evergreen been improved for farming purposes.

A. Not that I know of.

Q. Have you passed through it more than once.

A. I have a number of times.

Q. Was there anybody living on Sec. 16-29-14.

A. Not that I know of.

Q. You examined *very* forty.

A. We did, we was on every forty.

Q. And you found no evidence of any home or any clearing.

A. None whatever.

Cross-examination by Mr. Martin:

Q. You say the land around the Evergreen was cut clean.

A. What I went through was cut clean.

Q. That was fire wood timber wasn't it.

A. Well I guess the fire did go through.

Q. You cut fire wood timber clean.

A. I guess they did. I wasn't there when they logged it. I couldn't tell whether it was burned before or afterwards. I have heard them say they cut some burned timber up there.

218 Q. The fact it was cut clean might be accounted for by the fact it was fire burned timber might it not.

A. It might been.

Q. When did you come back on the reservation.

A. I came back about 3 or 4 years ago.

Q. When was the fire.

A. I couldn't tell you when the fire was.

Q. Now, you spoke of those sections north and west of this school section 16-29-14 as having been cut clean, did you measure the stumps there.

A. No sir, I did not.

Q. Don't you know as a matter of fact a great deal of the timber was mature.

A. It may have been mature.

Q. It may have all been mature.

A. It may have been.

Q. You didn't make any examination of that.

A. No sir I didn't.

Q. Now Mr. Dodge testified about $2\frac{1}{2}$ acres was necessary for camp purposes on sec. 16, was that right.

A. That is as near as we could get at by the measurement we made.

Q. That would leave about four and a half acres that was cut in addition to that necessary for camp purposes.

A. Something like that.

Q. There is a right of way runs through that section about half a mile isn't there, right of way of the Indian railroad.

A. I should judge about half a mile, I don't know.

Q. A right of way about fifty feet wide.

A. I should judge so about that wide, it may have been so wide, I don't know.

219 Q. Then at least $4\frac{1}{2}$ acres would be necessary to be cut for the purposes of that right of way, half a mile long and fifty feet wide.

A. I don't know, you will have to get someone to figure up what that will amount to, if it was half a mile long and fifty feet wide why some of you fellows that can figure can figure the acreage.

Q. Those lands are used in connection with the railroads.

A. I don't know.

Q. You were there on the land.

A. Yes.

Q. And made an estimate of the timber, that was cut did you not.

A. Yes.

Q. Didn't you see the right of way.

A. I saw the right of way.

Q. Did you go over it.

A. We did.

Q. How long would you say it was through that section.

A. Well I don't know, it might be half a mile and might be more and might be less.

Q. Is it at least half a mile.

A. I should judge about half a mile.

Q. And how wide would you estimate it to be.

A. Well I think we figured about fifty feet.

Redirect examination by Mr. Eberlein:

Q. In estimating the $7\frac{1}{2}$ acres you didn't count the entire right of way.

A. No sir.

220 Q. That 7 acres is exclusive of the right of way.

A. No that took in the right of way right where the shanties are, a little clearing on both sides of the right of way.

Q. But did you include in this 7 acres more than half an acre of right of way.

A. That I couldn't tell you now, that was left to Mr. Pendleton and Mr. Dodge.

The Complainant recalled LEN DODGE, who testified as follows:

Direct examination by Mr. Eberlein:

Q. Was there any body living on Sec. 16-29-15.

A. No sir.

Q. You examined every forty of that.

A. Yes sir.

Q. Of this 7 1/4 acres that you found cut over on Sec. 16-29-15, about how much of that was right of way.

A. Of this seven acres?

Q. Yes.

A. Why, it wouldn't be any more than half an acre to the outside.

Q. You didn't figure the right of way through the entire section, just figured the right of way where it was cut.

A. Yes.

Q. There was 7 acres cut out side of this right of way on through.

A. Yes, it run in a southwesterly direction.

The Complainant called ALBERT S. LARSEN, who being duly sworn testified as follows:

221 Direct examination by Mr. Eberlein:

Q. You reside in the city of Shawano.

A. Yes sir.

Q. How long have you lived here.

A. I have lived in the city since Jan'y 1st, 1903, with the exception of two years I was in Chicago.

Q. What is your business.

A. Attorney at law.

Q. Have you practiced law during the entire time you have lived in the city.

A. Yes sir.

Q. And during the two years you were in Chicago.

A. Yes sir.

Q. Were you at any time in the employ of the United States on the Menominee Reservation.

A. Yes sir.

Q. For how long were you on the Reservation.

A. I can't say exactly, my recollection is that I came there in 1901, that may have been 1900, I think it was 1901 and remained there until the last of 1902.

Q. During that time were you an attorney.

A. Yes sir.

Q. You are familiar with the construction placed upon the case of Beecher vs. Wetherby reported in the U. S. Reports by the bench and bar in this community.

Defendant objected as incompetent, irrelevant and immaterial.

A. Yes sir.

Q. What was the construction given to the case of Beecher vs. Wetherby by the bench and bar of this community relative
222 to the lands in school sections 16 of the Menominee Reservation.

Defendant objected same as above.

A. Under the decision in that case the title to the sixteenth sections of the Indian Reservation was vested in the State of Wisconsin or its grantees.

Q. Did you have occasion many times to advise owners and prospective buyers of the titles to those lands.

Defendant objected as incompetent and immaterial.

A. On various occasions, yes sir.

Q. What advise did you give them with reference to the ownership of these lands on the Indian Reservation.

Defendant objected same as above.

A. I advised them the title to the sixteenth sections on the Menominee Indian Reservation was in the State or its grantees.

Q. With relation to the case of Beecher vs. Wetherby, did you have also in your mind at the time of giving your opinion the decision of the land Department and the attitude of the Department or the Indian Commissioner with reference to those lands.

Defendant objected same as above.

A. I was conversant with those rules.

Q. And your opinion was based upon those too was it not.

A. The construction placed upon the decision in Beecher vs. Wetherby as well as the rulings of the Attorney General and rulings of the Interior Department were taken into consideration by me.

Q. You had occasion to discuss the case of Beecher vs. Wetherby with practically every lawyer in Shawano did you not.

223 Defendant objected same as above.

Q. So that you know the construction placed upon it by this bar.

A. I am not positive having discussed the question with Mr. Butz but I believe I discussed it with every other lawyer in the city of Shawano.

Cross-examination by Mr. Martin:

Q. How many attorneys were there in Shawano at that time, what time do you refer to before I ask that question.

A. The discussion of the case extended over a period from 1901, the time I first came upon the Reservation, off and on down to the present time. I was first asked for my opinion on it when I came to the Reservation which I figure I believe was in 1901. Mr. Doyle was then logging superintendent on the Menominee Indian Reservation and he was the owner or had the title under the state to a part of one of those sixteenth sections and was very much interested in the controversy, and soon after I arrived at the Agency he learned I was an attorney and he asked me about my opinion concerning his title and called my attention to a resolution having been passed by the legislature of this State assenting to *to* Menominee Indians occupying the reservation and asked me for my opinion of the effect of that consent upon his title.

Q. That was after he had purchased was it not, he had already purchased when he talked with you.

A. Yes sir.

Q. Now in what capacity was you employed on the reservation.

A. As clerk.

Q. Law clerk.

224 A. No. There is no position of law clerk there or was none then.

Q. Did you ever have occasion to advise the Indians with reference to their title.

A. I have discussed it with them but I was never asked for counsel or advise.

Q. Did you give them the same opinion that you gave to Mr. Doyle.

A. Yes, that matter came up in this way, while I was in the employ of the Department Seymour Hollister wanted permission to remove the timber, at that time the Indian Office had ceased giving permission to the owners of sixteenth sections to cut the timber and remove it. Some time prior to that Mr. Perry and I believe also the Oconto Company had cut the timber from sixteenth sections in which they were interested but there had been some complaint about it and I understood sometime thereafter the Department recalled its permission to remove the timber on the sixteenth sections, and that was the status of the matter when Mr. Hollister asked me, or possibly asked Mr. George and Mr. George asked me, I am not positive about that whether he wrote to me personally or wrote Mr. George, at any rate the matter was put up to me to get the consent of the Indians to remove the timber from the sixteenth section in which Mr. Hollister was interested. I talked the matter over with Steve Askinett, James Tourtelot and quite a number of the Indians there and if my memory serves me right Mr. Hollister offered at that time to give the Indians a very liberal price for logging the timber and offered to return back to the Indians the fee of the land after the timber had been removed and I advised the Indians with whom I talked to accept the proposition.

Q. That culminated in a contract.

225 A. It did not culminate in a contract.

Q. Wasn't there a contract with the Hollister Amos Company.

A. Oh, no. Some agitation was started over the matter and I saw that it was going to create discord among the Indians and I felt in view of the turn things had taken I couldn't as an employee of the Department press the matter any further, although it was my opinion it was to their interest to accept the proposal.

Q. Did you ever at any time have occasion to advise the Indians with reference to their rights to section 16.

A. I don't recall outside of what I just testified to. I don't recall ever having advised them, if I have I have forgotten about it and I don't believe I did.

Q. Did you ever advise them they did have good title to section sixteen.

A. I don't believe I ever gave them such advise.

Q. You came here in 1901.

A. That is my recollection.

Q. At that time the state had conveyed *their* title to school sections in the Menominee Reservation had it not.

A. At that time I understood that the Oconto Company had some interest in one of the sixteenth sections, and Mr. Doyle had an interest, Mr. Sherry and I believe Mr. Borgman. Although I am not positive as to that and later I understood that Mr. Hayter and Mr. Humphrey had some interest in it. Whether that was acquired before or after I don't know, I never looked it up.

Q. Do you recall anybody coming to you for your advise in regard to the effect the decision in Beecher vs. Wetherby had on the school sections prior to their purchase from the State.

226 A. I recall yes.

Q. Were you ever consulted in your capacity as attorney by any one who contemplated purchasing from the State and who relied upon your construction of Beecher vs. Wetherby.

A. Not who contemplated purchasing from the State.

Q. Well, from subsequent purchasers.

A. Yes.

Q. Who for instance.

A. Mr. Hudson of Green Bay.

Q. He talked with you before he purchased.

A. He talked with me before he purchased and the party from whom he proposed to purchase talked with me. I think my advise defeated the sale. I told them that in my opinion the then owners of the property had good title and as a result thereof they asked a price which Mr. Hudson refused to pay. They would have accepted the price which Mr. Hudson was willing to pay if I had told them they had no title, but it was because of the advise I gave them that they declined the offer which I think was something — 12 to 14 thousand.

Q. Who *was* you acting for.

A. At that time I was attorney for Mr. Hayter.

Q. You were the attorney for the parties who owned the land at that time.

A. Yes both parties consulted me.

Q. My question was a moment ago whether or not you advised

any one who contemplated purchasing these school sections and who relied upon your advise actually purchased the land.

A. No, there was no purchase made.

Q. As a result of your advise in *tha* matter, Did you construe Beecher vs. Wetherby as giving the State an absolute fee simply title to section sixteen in the Menominee Reservation irrespective of the Indians' claim to occupancy.

A. I didn't think the Indians had any right of occupancy.

Q. Didn't you take in to consideration the difference between the title in the lands in the present Menominee and the lands that was sold by that nation to the Stockbridge and Muncie Indians.

A. Before I gave any opinion at all I looked up the history of that title, and my conclusion was reached upon this reasoning. In the case of Beecher vs. Wetherby as I understood the case it was held that the grant by the United States, the enabling act gave the sixteenth sections to the State of Wisconsin and the acceptance of that grant by the State in its constitution vested the title to the sixteenth sections in the State of Wisconsin. In the case of McIntosh or McIntyre a case decided by Judge Marshall of the United States Supreme Court the nature of the Indian title was gone into and construed and the question in that case was whether an individual might extinguish the Indian right of occupancy either by treaty or negotiations with the chief or tribe or whether the right to terminate or extinguish the Indian right of occupancy was a right vested solely in the Federal Government. Marshall reasoned or threshed it out in this manner, he said when this country was discovered by the foreign powers they acquired certain rights by their discovery. He said if we didn't recognize they acquired some titled in the property by virtue of the discovery the discovery didn't amount to anything, and he said the title which they acquired by right of discovery was the

228 fee simply title subject to the Indian right of occupancy with the right by the Federal Government to extinguish that right of occupancy whenever the demand of civilization or demands of the government might require, but the right to extinguish that occupancy was vested in the Federal Government, but the case held as I remember it or understood it that by that discovery the fee simple title became vested in the discoverer and as a result of our treaty with Great Britain we succeeded to that fee simple title and likewise succeeded by treaty or purchase to the fee simple title acquired by other nations. What ever right the Government had at the time of the enabling act its acceptance by the State of Wisconsin in its constitution, what ever right and title the United States Government had passed to the State of Wisconsin irrespective of the fact that the land was in the possession of the Indians, I understood that when the land was afterwards surveyed that the course of title could not pass because there was no identity until the land had been identified and surveyed, but when subsequently the land was surveyed out the title became perfect in the state and its grantees. But the United States by the enabling act did not assume as I understood the law to give to the State any more than they had and the question then remained for solution as to whether the Indian rights of occupancy

had been extinguished because the state could not extinguish it. The federal government could and if they did not extinguish it the State had only the fee with the right to choose other sections if they didn't choose to take the sixteenth sections in the Menominee Reservation in the condition in which they were at the time of the enabling act. I then investigated the question of the Indian right of occupancy and became convinced that the Indian right of occupancy became extinguished by the treaty of 1849. The question then came up

for consideration as to the effect of the resolution passed by
 229 the State of Wisconsin assenting to the occupancy of the land I learned upon investigation that the assent given by the State of Wisconsin to occupancy of these lands by the Menominee Indians -as given upon the application of the Federal Government. That coupled with the fact of the terms of the treaty of 1849 convinced me that the right of occupancy of the Indians had become extinguished and that the Federal Government had recognized the fact that the Effect of the treaty of 1849 was to extinguish the right of occupancy and they recognizing that made application to the then owners of the right of occupancy as well as the fee for permission for the Indians to occupy the Reservation. I did not think that assent given by the State of Wisconsin had any effect upon the title, first, because the enabling act required the State to accept the lands in trust for school purposes and that the enabling act accepted the lands upon the terms upon which they were offered by the Federal Government and I considered that they thereupon became trust lands and that there was no power in the State to dispose of the lands in any other manner than in accordance with the terms of that trust. I didn't consider that the assent given by the State of Wisconsin to occupancy of the land by the Indians was a disposition of any interest in the lands for school purposes and I considered if the assent had any effect if it would otherwise have any effect it was void because it violated the terms of that trust. Secondly, I reached the conclusion that the assent was not a right given for a valuable consideration and had no greater dignity than a mere license, that in substance I think is the process of reasoning by which I reached the conclusion that I arrived at.

Q. And that same impression prevailed among the other members of the bar at Shawano I understand.

230 A. I frequently discussed it, I advanced those things and they acquiesced in them.

Q. The other attorneys concurred.

A. Yes sir.

Q. Have you a citation of that case decided by Judge Marshall.

A. I think it is McIntosh.

Q. Then you took that into consideration in arriving at the decision that you did and in formulating your opinion as you did.

A. Yes, that and the Beecher vs. Wetherby case.

Q. The Beecher vs. Wetherby case was not the only case considered by you in arriving at your opinion.

A. No, it was not.

Q. Did you have occasion to advise the Stockbridge and Muncie Indians with reference to their title to sixteenth sections.

A. Recently, only recently that council was held of the Stockbridge Reservation, I think in the last two or three months I advised them.

— — —
A. You are not asking what advise.

Q. Was it with reference to section 16.

A. Partly.

Q. Did you advise them that they had title to Section 16.

A. No sir.

Q. That they didn't have the title.

A. Yes.

Q. That question was fully determined by the Supreme Court in the case of Beecher vs. Wetherby.

A. Yes sir. The particular question upon which I gave
231 them advise was with a view of entering into a contract with the Government to recover the value of the sixteenth sections which they lost. Judge Seaman held the treaty of 1856 with the Stockbridge and Muncie Indians was a grant for a valuable consideration and I think the effect of — Seaman's decision would give the Indians a claim against the Government.

Q. You considered the fact that the Menominee Indians actually occupied the land at the time of the grant to the State as immaterial.

A. I considered it so yes.

Q. What was the process of your reasoning that their right of occupancy had been extinguished.

A. As I understood from all the information I could get that they had not at that time in fact occupied any part of that land between 1849 and 1854. I made many applications for the Indians for enrollment in the Menominee tribe and each and every Indian where I investigated their residence was at Poygan Lake or in the southern part of the State. I had no evidence that any part of that land had been occupied, but that was immaterial the right of occupancy having been extinguished by the treaty of 1848.

Q. Do you say that the Indians did not occupy the present reservation prior to 1854.

A. That was my understanding of it, yes.

Q. But the question was immaterial with you whether they had or not.

A. Yes, I thought their right of occupancy was extinguished.

Q. And you didn't make as careful an investigation as you might.

A. No.

232 Q. You didn't run that down because you did not consider their occupancy material anyway.

A. No, that is it exactly.

Q. You mean by that that such applications as you made were those who were not members of the tribe.

A. Yes. Of course that was a reservation of the Indians, but it was necessary in making application for enrollment of the Indians

to show that they had affiliated with the tribe and in making their proofs for enrollment I showed where their ancestors had resided.

Q. And that would be down around Poygan.

A. That necessitated an investigation where they did live and they said they had lived with the Indians at Poygan Lake and I don't recall a single instance where they traced their ancestry back to a period as early as 1854 or prior thereto up on this reservation.

Q. Of course you know there were other bands of Indians down at Lake Poygan, Menominee, Shawano and Sturgeon Bay.

A. I don't recall any such.

Q. I understood you to say in your answer a few minutes ago that according to your construction of the law the title of the State upon its acceptance of the provisions of the enabling act granting the sixteenth sections upon a survey of the land approved by the proper officers the right of State related back to the date of the original grant.

A. That is the way I understood it yes sir.

Q. That the State took as of the date of the enabling act and not as of the date of the approval of the survey.

A. Yes sir.

Q. What was your authority for that.

A. The doctrine of relating back as I understand that
233 doctrine, as I have always understood it, as it is an equitable doctrine that whenever the right of innocent third persons have not intervened then it would relate back and take effect as of date of the grant although something remained to be done to perfect the title.

Q. That is between the Government and the State.

A. Yes.

Q. In the absence of any intervening right.

A. Yes.

Q. That is simply from your general knowledge of law and your process of reasoning.

A. Yes.

Q. There is no specific authority for that but that was the logical sequence of your study of the law.

A. I have frequently had occasion to adopt that doctrine.

Q. You were also of opinion that if third persons intervened the doctrine of relation would apply.

A. If the right of interested third persons did intervene and there was nothing of record or equitable relation that it should relate back I understand that it should not relate back.

A. Then there was several things that you took into consideration in determining the rights of the State to sixteenth sections.

A. Why certainly.

Q. It was not any one particular thing but the decision of Judge Marshall in the McIntosh case as well as Beecher vs. Wetherby and upon the equitable doctrine of relation.

A. I think if you take any one of the important links out of that chain it would seriously affect the result you would reach.

234 Rdirect examination by Mr. Eberlein:

Q. Your attention was also called and you ascertained that the reservation now occupied by the Menominee Indians was not the identical reservation to which they were attempted to be moved in 1852.

A. I understand that there is an error of several ranges.

Q. That the Indians never in fact occupied ranges 13 and 14 and that the temporary reservation was merely ranges 15, 16, 17, 18 and 19.

A. That was demonstrated by the assent given by the State of Wisconsin.

Recross-examination by Mr. Martin:

Q. You do not have any personal knowledge of what they occupied.

A. That question came up for consideration in the question of the descriptions—

Q. You are giving the result of your investigation.

A. Yes, that was in the form of a resolution.

Defendant objected to the testimony of the witness along this line as hearsay, incompetent, irrelevant and immaterial.

A. I had no original maps before me at that time but I did have access to the correspondence and records in the office but I didn't make any investigation of the lines myself.

By Mr. Thompson:

The decision of Beecher vs. Wetherby was widely known to the attorneys throughout this section and to the attorneys of people dealing in land in school sections.

235 A. It was. It was cited by the Department in support of its refusal to allow this Sherry Co., in their logging operations up there, and the Paine Lumber Co. was considering moving timber. The Paine Lumber Company was obliged to remove the timber within a limited time. I think the title would revert to Mrs. Borgman, and they were very anxious to have their timber removed within the life of the limitation in their deed and the result was the ruling of the department and Beecher vs. Wetherby was a matter of very common discussion. You will find it referred to again and again in the correspondence with the department, not only Mr. George but his predecessors.

By Mr. Martin: Do you claim the department based its refusal on the authority in Beecher vs. Wetherby.

A. Yes sir.

By Mr. Thompson: They claimed that the title in fee was where.

A. They claimed the title in fee was in the State and its grantees but there was no right of ingress and egress to the land because you couldn't get to the land without committing trespass on the Menominee Reservation.

By Mr. Martin: Didn't they say this, that Sherry had no right to cut the timber on the land and that the department would not consent to the right of ingress and egress for the purpose of doing an unlawful act or for the purpose of committing trespass.

A. Not for the purpose of committing any trespass upon the sixteenth section, that they couldn't get to the land, they couldn't remove the timber without committing trespass and interfering with the Indian right of occupancy.

Q. That was the impression you got from the department's refusal to permit Sherry to cut timber on that land.

236 A. Yes sir. I didn't understand in any correspondence with the department they questioned the title to the timber itself or the fee of the land. I am confident you will not find any letter where the title to the sixteenth sections is questioned.

Q. Are you familiar with that letter about which you have been testifying wherein the department refused Sherry the right to cut the timber on the sixteenth section or the right of ingress and egress.

A. Yes sir. I don't believe I read the letter since I left the reservation but I am quite clear in my recollection that it was based not upon any lack of title in the fee to the State and its grantees, not upon any questions of the title of the State and its grantees to the timber but upon the fact they could not remove it without disturbing the Indian occupancy. In fact I think I received some ruling from the Attorney General or some one and I think I had a bill introduced in Congress and I think that the department then took the same position in opposition to that bill and the consequences was the Congressman declined to press it.

Q. As a matter of fact wasn't permission to cut timber upon that section refused because the cutting of the timber itself was an unlawful act and a trespass upon the part of Sherry and not egress and ingress.

A. I don't think so.

Q. To refresh your memory on that I want to read to you from Complainant's Ex. F, attached to the original bill of complaint in this action which is the position of the Department of the Interior upon that very question, "the cutting upon said section being illegal in my opinion it follows that the State officers and its assigns can have no right to pass through the reservation to do such
237 illegal act." Does that refresh your memory.

A. No sir, I still have the same opinion I had before.

Q. You said a moment ago you did not believe that the department ever held the cutting of the timber was illegal.

A. I don't believe it now.

Q. Just read that letter. Didn't that come up in this way. Didn't Sherry ask permission to go over the Indian line for the purpose of cutting the timber on this section and the department said inasmuch as the cutting of timber on that section would be illegal we cannot grant your request.

A. I have not seen a letter from the department in which it in any way called in question the fact that the Beecher vs. Wetherby

case held that the State and its grantees were not the owners of the fee subject to the Indian right of occupancy.

Q. But they did hold in that very case to which I have just referred you that the cutting of timber in that section by Sherry under his deed from the State would be an illegal act.

A. I am reading now from a part of Ex. F. Under the rulings in *Beecher vs. Wetherby* it would be *seem* to be clear the fee simple to the school sections within the present Menominee Reservation had passed from the United States to the State of Wisconsin, being subject to the Indian right of occupancy a right which has in this instance existed continuously from the discovery of the country to the present day. In my opinion the State nor its assigns can interfere in any manner with the full enjoyment of that right". I still adhere to my former opinion I cannot understand that as you understand it.

(March 25th, 1916.)

By Mr. Thompson: The defendant having produced a contract between the Oconto Company and the United States of America which has been offered in evidence and marked 238 Complainant's Ex. 2, and the defendant desiring to withdraw the original exhibit for its files, it is now stipulated that the said contract, Ex. No. 2, may be read into the record at this time and the same as so read into the record shall be and have the same force and effect as the original exhibit offered in evidence would have had *had* it remained as an exhibit in evidence in the case.

Contract Between the Oconto Company and the United States of America.

Whereas the Oconto Company are the owners of the fee to the following described lands, to wit:

N. E. N. E.

S. W. N. E.

S. E. N. E.

N. E. S. E.

N. W. S. E.

and S. W. N. W. in Section 16 Township 30, north of Range 16 east,

And whereas the pine on said lands are estimated at five million feet is in danger from forest fires, and

Whereas the Menominee Indians in council assembled had petitioned the United States for permission to cut said timber and deliver same in logs on the bank of the south branch of the Oconto River, and

Whereas the said Oconto Company have *a* submitted a proposal upon terms herein after recited for the cutting and logging of the timber from the lands above described, which said proposal has been accepted and approved by the Secretary of the Interior of the United States,

Now this contract made and entered into *be* and between The

Oconto Company, a corporation duly organized under the laws of the State of Wisconsin, of the first part, and William A. Jones, Commissioner of Indian Affairs of the United States of America acting for and in behalf of the United States, of the second part,

Witnesseth that the parties hereto have entered into the following agreement to wit:

First. That the timber from the lands hereinbefore described estimated at five million feet, is to be cut, removed and banked on the south branch of the Oconto River by the Menominee Indians acting under the direction of the United States Indian Agent and the superintendent of logging on the Menominee Reservation, Wisconsin, and in conference with the rules and regulations now in force on said reservation for the cutting and logging of timber, and said logs and timber when cut, removed and banked as aforesaid shall be given into the possession of the Oconto Company.

Second. The party of the first part in consideration of the cutting, hauling, removing, banking and delivery of said timber and logs shall cause to be paid to the party of the second part the sum of \$4.25 per thousand feet, B. M. (the figures \$5.50 interlined in lead pencil appear above the typewritten figures, \$4.25).

Third. The party of the first part further agrees that it will advance such reasonable sums of money in payment for the cutting, hauling and banking of said logs and timber from the lands herein described at such times as the needs of the service and rules of the department require.

Fourth. The party of the first part further agrees that on the delivery of the party of the second part of the logs and timber cut from the lands herein described they will deliver to said party of the second part a good and sufficient deed of their right, title and interest in and to said described lands.

240 Fifth. The party of the first part further agrees that on the completion of the cutting, removing banking, and delivery of said logs and timber, at the point herein described, to wit: the south branch of the Oconto River, and on receipt of a properly attested scale of said logs and a timber attached to a statement of the aggregate amount of logs and timber cut, removed and delivered as aforesaid, and computed at the price hereinabove stated, to wit \$4.25 per thousand feet B. M. (here again appear the figures in lead pencil \$5.50 above the typewritten figures of \$4.25) will pay the balance found to be for the cutting, removing and banking of said logs and timber as aforesaid.

Sixth. It is further agreed that the party of the first part shall execute with good and sufficient surety a bond to the United States in the sum of thirty thousand dollars conditioned upon the faithful performance of this contract and the agreement herein made by the said party of the first part and it is an express condition of this contract that no member of Congress shall be admitted to any share in this contract nor to any benefit to arise therefrom.

In witness whereof the parties hereto have *hnto* subscribed their names this fifth day of November, A. D. 1898.

(Corporate Seal of the Oconto Company.)

OCONTO COMPANY,
By JAMES C. BROOKS,
President.

Attest:

O. K. ELLIS, *Secretary.*

WILLIAM A. JONES,
Commissioner, Indian Affairs.

Subscribed and sworn to before me this fifth day of November,
A. D. 1898.

[SEAL.]

GEORGE L. WARD,
Notary Public.

241 (Attached to the contract is a bond in the sum of \$30,000.00 signed by the City Trust Safe Deposit and Surety Company of Philadelphia, Pennsylvania.)

(On the back of the contract appears this endorsement: "Department of the Interior, November 8th, 1898. The within contract is hereby approved. C. N. Bliss, Secretary.")

Defendant objected as immaterial.

Complainant offered in evidence Ex. No. 50, being the Hollister Amos Contract.

Defendant objected as immaterial.

By Mr. Thompson: This is produced by the Government and they wish to have it returned to their files, it being a letterpress copy of the original and Ex. No. 50 is read into the record under the same stipulation as applies to Ex. No. 2.

"DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, March 17, 1900.

Refer in reply to the following accounts: 12947-1900, inclosure.
Mr. D. H. George, Indian Agent, Green Bay Indian Agency, Wisconsin.

SIR: Pursuant to your request of the 12th instant therein enclosed herewith for your information and guidance a copy of the contract entered into between Hollister Amos and Company of Oshkosh, Wisconsin and William A. Jones, Commissioner of Indian Affairs, acting for and in behalf of the United States for the cutting and banking the timber on a part of section 16, Town 30 Range 16 east, by the said Hollister Amos and Company.

242 Very respectfully,

A. C. TONNER,
Acting Assistant Commissioner.

Contract between Hollister Amos and Company and the United States of America.

Whereas Hollister Amos and Co., a co-partnership consisting of S. W. Hollister and Frank Amos, are the owners of the fee to the hereinafter described lands, part of which were conveyed by Hiram Smith and wife to S. W. Hollister and Frank Amos comprising the firm of Hollister Amos and Company and part of which were conveyed by J. N. Cameron as assignee for the benefit of the creditors of Henry Sherry and Abbey Sherry, wife of said Henry Sherry, unto Seymour W. Hollister of said firm, the conveyance being nevertheless for the benefit of said firm and in trust for the uses and purposes of said co-partnership and which said lands are described as follows, to wit:

N. W. N. E.

N. E. N. W.

S. W. S. W.

S. W. N. W.

N. E. S. W.

N. W. S. W.

S. E. S. W.

S. W. S. E.

S. E. S. E. Dection 16 Town 30 Range 16 east and,

Whereas the pine and cedar timber on said lands estimated at 1,200 thousand feet in danger from forest fires, and

Whereas the Menominee Indians in council assembled have petitioned the United States for permission to cut said timber
243 and deliver same in logs on the banks of the south branch of the Oconto River and,

Whereas Hollister Amos and Company have submitted a proposal upon terms hereinafter recited for the cutting and logging of the timber upon the lands above described which said proposal had been accepted and approved by the Secretary of the Interior of the United States. Now this agreement made and entered into by and between Hollister, Amos and Company of Oshkosh, Wisconsin, parties of the first part and William A. Jones, Commissioner of Indian Affairs of the United States of America, acting for and in behalf of the United States, party of the second part. That the parties hereto have entered into the following agreement, to wit:

First. That the timber from the lands hereinbefore described, estimated at 1,200 thousand feet, is to be cut, removed and banked on the south branch of the Oconto River by the Menominee Indians acting under the direction of the United States Indian Agent and the superintendent of logging of the Menominee Reservation, Wisconsin, and in conformance with the rules and regulations now in force on said reservation for the cutting and logging of timber, and said logs and timber when cut and removed and banked as aforesaid shall be given into the possession of Hollister Amos and Co.

Second. The parties of the first part in consideration of the cutting, hauling, removing and banking, and delivery of said timber and logs agree to pay to the party of the second part the sum of \$5.50 per thousand feet B. M.

Third. The parties of the first part further agree that they will advance such reasonable sums of money in payment of the cutting, hauling and banking of the logs and timber from the lands herein described at such time as the needs of the service and rules of the department require.

244 Fourth. The parties of the first part further agree that on the delivery by the party of the Second part of the logs and timber cut from the lands herein described they will deliver to said party of the second part a good and sufficient deed of all their rights, title and interest in and to said described lands.

Fifth. The parties of the first part further agree that on the completion of the cutting, removal, banking and delivery of said logs and timber at the point herein described to wit:

The south branch of the Oconto River and on the receipt of the properly attested scale of said logs and timber attached to a statement of the aggregate amount of logs and timber, cut, removed and delivered as aforesaid and computed at the price hereinbefore stated, to-wit: \$5.50 per thousand feet, B. M., will pay the balance found to be due for the cutting, removing and banking of said logs and timber as aforesaid.

Sixth. It is further agreed that the parties of the first part shall execute with a good and sufficient surety a bond to the United States in the sum of \$15,000 conditioned upon the faithful performance of this contract, and the agreements herein made by the said parties of the first part. And it is an express condition of this contract that no member of Congress shall be admitted to any share in this contract nor to any benefit to arise therefrom.

In witness whereof the parties hereto have hereunto subscribed their names this 14th day of February, A. D. 1900.

HOLLISTER AMOS AND CO.

W. A. JONES,

Commissioner of Indian Affairs.

Subscribed and sworn to before me this 19th day of February, A. D. 1900.

H. B. HARSHAW,

Notary Public.

245

DEPARTMENT OF THE INTERIOR,

Feb'y 20th, 1900.

Approved:

E. A. HITCHCOCK, *Secretary.*

UNITED STATES INDIAN SERVICE,
GREEN BAY AGENCY,
KESHENA, WISCONSIN, April 13, 1900.

Hollister Amos and Co. to United States, Dr.

To banking logs on school section 1,410,000 feet of pine	
logs at \$5.50	7,755.00
351,400 feet cedar logs at \$5.50	1,932.70
	<hr/>
	\$9,687.70

The complainant recalled A. S. NICHOLSON, who testified as follows:

Direct examination by Mr. Eberlein:

Q. Mr. Nicholson, going back to the testimony you gave yesterday with reference to the pine trees cut *but* Kemnitz on 16-29-14, I wish to ask you whether the ten that were felled by Mr. Kemnitz and found unsuitable to his use were, after, taken to the mill and cut into lumber.

A. Cut into logs taken to the mill and sawed into lumber.

Q. And that lumber was disposed of in the market the same as the other products of the mill.

A. Yes, sir.

Q. And the money received from those logs was put into the same fund that you put the other moneys into.

A. Yes sir.

246 Q. The Wisconsin and Northern Railroad goes through certain sections 16 on this reservation, which ones.

A. 16-30-14.

A. That is the only section 16 that is cut by the railway.

A. Yes sir.

Q. The right of way mentioned in yesterday's testimony on section 16-29-14 is a logging right of way put in by the Menominee Indians.

A. Yes, logging right of way of the Menominee Indian Railroad.

Q. The Wisconsin and Northern Railway Company has no interest whatever in that right of way.

A. None at all.

Q. What right of way was built in accordance with instructions from the Commissioner of Indian Affairs and were solely responsible for the building of that right of way at that place.

A. Act of congress, amendment of 1910.

Q. Did that act definitely locate the line of this railway or was the exact location of it left to your discretion.

A. Left to my discretion in connection with the engineer sent on by the Secretary of the Interior.

Q. Can you give us the aggregate of all the timber taken from this section by the construction of that right of way.

A. 15,000 of pine, 74,001 feet of hemlock, 34-55/100 cords of pulp wood, 2,878 feet of bass wood, 3,288 feet of birch, 75 tamarack ties.

Q. What was the price received for that timber, the aggregate amount.

A. \$382.12.

247 Q. What became of that money.

A. Deposited with the Treasurer of the United States to the credit of the Indians.

Q. Upon how much acreage was this timber cut.

A. My figures show 12,209 acres.

Q. What price was received per acre for the land, for the use of it through that section.

A. \$3 per acre.

Q. You have not yet given us the total moneys received for the timber taken from sec. 16-29-14, can you give us that.

A. \$529.98.

Q. Did that include the moneys Mr. Kemnitz paid for pine.

A. It includes that, that is approximate. I can't exactly tell with the lumber mixed in.

Q. What became of that money.

A. Deposited with the Treasurer of the United States to the credit of the Indians.

Q. Who deposited it.

A. I did.

Q. Who sold the lumber and material off that section.

A. The authorized agent of the Government, myself and the sales agent, employees of the Government.

Q. What is your title.

A. Superintendant and Special Disbursing agent for the United States.

Q. For the Menominee Reservation.

A. Yes, sir.

Q. That was paid to the United States the same as other moneys received from other timber cut upon lands upon the Menominee Indian Reservation, other than section 16.

A. Yes, sir.

248 Q. You have persistently denied any right to any part of that money by the claimed owners of Sec. 16-29-14.

A. Nobody asked me for it.

Q. You have refused Mr. Humphrey's right to that money.

A. It has never been brought in question.

Q. Didn't you inform the attorney for Hayter and Humphrey that they had nothing to say what would be done or what you in fact was foing upon that section.

A. Something to that effect.

249 *Testimony Taken at Oshkosh, Wis., Monday, March 27th, 1916, at One o'Clock p. m.*

The Complainant called CHARLES NEVITT, who being duly sworn testified as follows:

Direct examination by Mr. Thompson:

Q. Where do you reside?

A. Oshkosh, Wisconsin.

Q. And you have lived here how many years.

A. Since 1855.

Q. You are and for a great many years have been an officer of the Paine Lumber Co.

A. Yes, sir.

Q. What office have you held and do you now hold.

A. Treasurer.

Q. Before you became connected with the Paine Lumber Co., as an officer had you been an attorney for it or one of its attorneys for some time.

A. Yes, sir.

Q. You were admitted to practice law about when.

A. 1880.

Q. Do you remember of the Paine Lumber Co., buying some of the pine timber on a certain school section of the Menominee Reservation in Wisconsin.

A. Yes, sir.

Q. About when was that.

A. 1887.

Q. Who acted for the Paine Lumber Co., in the purchase of that timber.

A. A. L. Osborn.

250 Q. Is Mr. A. L. Osborn out of the city at this time.

A. I am so informed he is.

Q. Did you talk with him about the purchase of that pine timber and the title to it before the purchase was made.

A. Yes, sir.

Q. Were you at that time familiar with the decision of the Supreme Court of the United States in Beecher vs. Wetherby.

A. Yes, sir.

Defendant objects as immaterial.

Q. And was that decision well known throughout this part of the State of Wisconsin.

A. I believe it was.

Q. And in talking with him and advising with him about the purchase of that land can you tell me whether or not you two as representatives of the Paine Lumber Co., and the Paine Lumber Co., relied upon the State's title being established by the decision in Beecher vs. Wetherby.

Defendant objected as incompetent, irrelevant, immaterial, hearsay and calls for what was said or understood by Mr. Osborn.

A. We did.

Q. Did you advise him as to the effect of that decision at all.

Defendant objected as immaterial.

A. Our firm did.

Q. And what was your advise as to the effect of that decision.

Defendant objected same as above.

A. That the decision would protect us in the purchase or help to protect us.

251 Q. You were purchasing from parties who had bought the State title were you.

A. Yes, sir.

Q. That decision was considered at that time by members of the

bar and lumbermen and timbermen in this part of the country as establishing the State's title to sections sixteen in the reservation was it.

Defendant objected, as incompetent, irrelevant and immaterial.

A. I believe it was so regarded.

Q. Have you the original instrument under which the Paine Lumber Com., acquired title to the pine timber on one of these sections 16 in that reservation.

A. I have.

Q. Will you produce it.

Defendant objected as immaterial.

(Witness produces paper).

Q. Is this paper marked #51, the original instrument by which the Paine Lumber Co., acquired title of its interest in this timber.

A. It is.

Complainant offered in evidence Ex. No. 51.

Defendant objected as immaterial and irrelevant.

It was stipulated that the same may be read into the record and that the same shall have the same force and effect as if the original exhibit was left on file and subject to the same objections.

This indenture made this 6th day of April, 1889, between H. G. Borgman and Anna Borgman his wife, of the City of Antigo, Langlade County, State of Wisconsin, parties of the first part, and the Paine Lumber Co., Limited, a corporation of the State of Wisconsin having its principal business office at the City of Oshkosh in
252 said State, party of the second part,

Witnesseth that the said parties of the first part for and in consideration of the sum of Twenty one hundred dollars to them in hand paid by the party of the second part, and receipt whereof is hereby confessed and acknowledged, have given, granted, sold, remised and conveyed unto said party of the second part, and by these presents do give, grant, sell, remise and convey unto the said party of the second part, its successors and assigns forever provided the timber ir removed within the time hereinafter specified all the pine trees or pine timber on the following described land in Shawano County, Wisconsin, to wit: All of Section 16, Township 30 North of Range 13 East with the right and privilege of entering upon said land at any time within ten years from this date for the purposes of cutting, removing and taking away said pine timber or pine trees in the usual manner, and with the right of such further time hereafter as might be necessary in order to avoid hindrance or prevention on the part of the United States or those claiming title under and from the United States in cutting and removing the aforesaid pine. And the parties of the first part covenant and agree that the above described pine timber may without risk or liability of the parties of the first part, their heirs or assigns, and at the risk of the party of the second part and its assigns, remain quietly and undisturbed on said land

for the above time mentioned and agree upon for the removal of said pine trees and pine timber. And the parties of the first part and assigns of the fee of the above described land shall not be held liable or be liable for any trespass committed on said land by any person other than themselves. (The words "or any loss to the party of the second part or its assigns whatsoever," are written and crossed out with red ink and it is noted on the side as follows: "The 253 words on the last two lines of this sheet were erased and not intended to be a part of this deed before execution and delivery. The following are words so stricken out "for any loss to the party of the second part or assigns whatsoever".) or for loss caused by elements except that the said parties of the first part or their assigns as aforesaid precipitated the same. And it is understood and agreed that in event the land immediately adjacent to the above land shall be thrown into the market by the United States of offered for sale or for settlement, then in no event shall the party of the second part or assigns have to exceed three years' time from said date that the adjacent lands are subject to entry or for sale of for settlement in which to remove the above mentioned pine timber or trees.

And it is further understood and agreed that all of said pine which may be unremoved at the expiration of the time or times and under the conditions of limitation and conditions hereinbefore set forth shall revert back to the said parties of the first part or their assigns without consideration.

And the parties of the first part hereby agree to pay all taxes, special or general, that may be assessed against said lands for the first three years that the same are assessed, and that thereafter the party of the second part shall be liable for one half of all taxes assessed against same as long as it claims the pine on the land, and it is further understood that it is the intention of the parties of the first part by these covenants to only convey to the parties of the second part (then there are two lines scratched out in red ink and notation on the side "The words on 8th and 9th lines of this sheet were erased before execution and delivery of this deed. The following are the words so erased and are not to be a part thereof,"

254 all right, title interest and claim to or which they may have in and to) the pine timber or pine trees on said Section 16 and not the fee simple title to the land or any part thereof, together with all the right, title, interest, claim or demand whatsoever of the said parties of the first part, either in law or equity, either in possession or expectancy of or in or to the above bargained pine. To have and to hold the said pine as above described unto the said party of the second part and its successors and assigns under the conditions of limitation hereinbefore set forth, and the said parties of the first part for themselves, their heirs, executors and administrators do covenant, grant, bargain and agree to and with the said party of the second part, its successors and assigns, that the above bargained pine in the quiet and peaceable possession of the said party of the second part, its successors and assigns, against all and every person or persons claiming the same they forever warrant and defend under the conditions and limitations herein set forth.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

H. G. BORGMAN. [SEAL.]

ANNA H. BORGMAN. [SEAL.]

Signed, sealed and delivered in the presence of

E. R. COLTON,

L. M. BIRGMAN.

Acknowledged before a notary public with the certificate of acknowledgment which appears.

[Endorsed:] No. 23292 Register's Office, Shawano, Wis. Recorded March 11th, 1890, at one P. M. Vol. 29 deeds, pages 621 and 622 and 623 —. Register Complainant also offered in evidence the certificate of registry just read.

Cross-examination by Mr. Martin:

255 Q. As I understand you were acting as attorney at that time for the Paine Lumber Co.

A. Yes sir, our firm was.

Q. What was your firm.

A. Weisbrod, Harshaw and Nevitt.

Q. You were the Mr. Nevitt.

A. Yes sir.

Q. In what capacity was Mr. Osborn representing the company.

A. He was one of the employees of the Paine Lumber Co.

Q. Purchasing Agent.

A. Woodsman and timberman, buying logs and looking after their land.

Q. And the Paine Lumber Company relied upon your firm for their legal advise in connection with the purchase of timber and land.

A. Yes sir.

Q. Did you advise them in this particular instance or was the advise given by some other member of your firm.

A. I don't recall definitely.

Q. Did you prepare this contract or deed.

A. I did not.

Q. Was it prepared in your office.

A. No sir.

Q. At the time this purchase was made I believe you stated you were familiar with the decision of Beecher vs. Wetherby.

A. I recall that there was such a decision.

Q. Did you have the matter in mind or so far as you know was it in the minds of any other members or your firm at the time this particular purchase was made.

A. I remember it was frequently discussed at that time.

256 Q. By whom.

A. The members of our firm and members of the Paine Lumber Co.

Q. You wouldn't say that this purchase was made by the Paine Lumber Co., on the strength of the decision in Beecher vs. Wetherby would you.

A. Yes largely.

Q. Upon what do you base that if you did not prepare this contract and do not recall that you advised them in that connection.

A. It being a forty on the Indian Reservation the decision in Beecher vs. Wetherby exerted a good deal of influence in the minds of people who were buying at that time.

Q. You are speaking just generally and what you believe the condition to have been and not what you had any personal knowledge of.

A. Well you are partially right there. I can't remember definitely in regard to these transactions.

Q. Was it your understanding and was it the understanding of your firm that the decision in Beecher vs. Wetherby fully protected the Paine Lumber Company in the purchase of the timber on this land.

A. That was the impression that has always rested in my mind since that purchase.

Q. That is that that decision fully protected the Paine Lumber Company in the purchase of the timber, then what was the necessity for the insertion in the contract or deed with reference to delay caused by the Government, delay to the Paine Lumber Co., in taking off the pine.

A. Because the Indians as I recall it was said to have the right of occupancy.

Q. In Beecher vs. Wetherby.

257 A. I don't know whether that occurs in the decision of Beecher vs. Wetherby or not, but that point I remember or I believe was material at the time.

Q. Then you didn't understand the decision of Beecher vs. Wetherby to fully protect the Paine Lumber Company under its contract or deed.

A. I wouldn't say as to that whether it was absolute or not.

Q. You don't recall.

A. I don't.

Q. What is your best judgment as to that having in mind the provisions in the contract, with reference to the extension of time for the removal of the timber in the event of interference by the Government.

A. I will repeat my answer I don't believe it did.

Q. What was the necessity of the insertion of that provision.

A. That they might not have the privilege of going upon the land as long as the Indians had the right of occupancy, that is the impression that has always rested in my mind ever since that time.

Q. In other words the impression you have always had the Indians have the present right of occupancy and until their right has been extinguished the right of the state and its grantees do not attach, is that correct.

A. That is the impression that I have had.

Q. And prior to Beecher vs. Wetherby.

A. Unless there was some provision given.

Q. In other words you had no legal right to go upon the land.

258 A. I recall writing the Interior Department about it and had a letter from the Interior Department saying that the title was in the State or in our grantor, but that the Indians had the right of occupancy.

Q. That is the substance.

A. I may not state it exactly as the records show but that is the impression that I have.

Q. Now when you say that in your judgment Beecher vs. Wetherby protected the Paine Lumber Company in this contract by that, just what do you mean, protected the Paine Lumber Company.

A. Was the decision under which our title would be called good or safe.

Q. It never was claimed by the Paine Lumber Company or by any members of your firm that the Paine Lumber Company would have the present right to go upon the land as long as it remained in the occupancy of the Indians.

A. No I don't know that they ever made that claim.

Redirect Examination by Mr. Thompson:

Q. Of course the owners of section sixteen claiming under the State title could not go on those sections without going across other Indian lands in the reservation.

A. No sir.

Q. There would have to be some permission or consent to go on there at all.

A. Certainly.

Recross-examination by Mr. Martin:

Q. When you speak of present right or occupancy you mean right of occupancy of section sixteen do you not.

A. I so understand it.

259 Q. That the Indians had the right of occupancy of those particular sections.

A. Yes sir.

Q. When you were testifying a moment ago you did not have in mind the egress and ingress.

A. Not particularly.

Q. Even if the purchasers from the State had the right to go across the reservation to reach the sixteenth sections they would have no right of occupancy upon those sixteenth sections until the Indian right of occupancy had been fully extinguished.

A. That is the way I understood.

Q. But they could not test the question as to whether or not they could cut the timber unless they could get permission to cross the Indian lands in any event could they.

Defendant objected as incompetent, irrelevant and immaterial. Calling for a conclusion.

A. I should say not.

By Mr. Martin: I believe you said you were an attorney.

A. Yes sir.

Q. You are practicing now.

A. No. Not for twenty five years.

Q. You are familiar of course with the old common law principal if a party sells land that is completely surrounded by other land owned by him that there is an implied right of egress and ingress.

A. I have always had that understanding.

By Mr. Thompson: Did you ever understand that that applied to the United States when they didn't wish to consent.

A. I have always understood that the United States would have to allow you to attack it.

260 By Mr. Martin: In other words the United States like any other grantor sold a given tract of land surrounded by other lands belonging to the United States the same common law rule or principal of the right of ingress or egress would apply.

A. No. I never understood it that way because I always understood the United States has got to give you permission to bring an action.

Q. I am speaking of the right of going upon the land and have the right of the use and enjoyment of it.

A. Well I would be a trespasser just the same on the land of the United States as I would any other individual would I not.

Q. I think not. I am asking for your opinion on that.

A. I have none.

Complainant offered in evidence paper marked Ex. No. 52, being certified copy of the order authorizing the issuance of a subpoena duces tecum.

The Complainant called MOSES HOPPER, who being duly sworn testified as follows:

Direct examination by Mr. Thompson:

Q. You live where.

A. In Oshkosh.

Q. Wisconsin.

A. Wisconsin, Winnebago County.

Q. How old are you.

A. 81.

Q. How long have you lived in the county of Winnebago.

A. Since 1857, July.

261 Q. And you are a practicing attorney at law.

A. I am and have been since that time.

Q. And you are authorized to practice in all the State Courts of Wisconsin and in the Federal Courts including the Federal Supreme Court.

A. I am as I understand it.

Q. And you have practiced in all those courts.

A. I have practiced in all those courts.

Q. Were you acquainted in their life time with Mr. Charles Barber and Mr. Charles Felker.

A. Very well acquainted with both of them.

Q. They were as I recall it the attorneys in the case of Beecher vs. Wetherby, decided sometime prior to 1880, do you recall whether they were or not.

A. Mr. Barber as I understand was an attorney and I had always supposed Mr. Felker was of counsel but he may have been an attorney.

Defendant moved to strike out the answer.

Q. I will ask you another question, those gentlemen were lawyers of considerable standing and reputation and ability in this part of the State of Wisconsin were they not.

A. Excellent.

Q. They are both dead.

A. They are both dead.

Q. Can you tell me whether or not the decision of the Supreme Court of the United States in the case of Beecher vs. Wetherby was well known to the members of the bar of eastern and northern Wisconsin at and after the time it was rendered.

Defendant objected as incompetent irrelevant and immaterial.

Qualifications of the witness to answer the question not
262 having been shown.

A. It was so far as the city of Oshkosh was concerned and as I understand through out this part of the State generally.

Defendant moved to strike out the last part of the answer.

Q. Did a great many of the individuals and corporations who were engaged in logging and lumbering in the eastern and northern part of the State have their headquarters in the city of Oshkosh and in the city of Neenah.

Defendant objected as immaterial.

A. There was kind of a headquarters for lumber men in Oshkosh for those who would gossip and talk over affairs in what is now the Hay hard ware store on main street. I remember Beecher used to be there a great deal at that store.

Q. Was the fact of the decision in Beecher vs. Wetherby well known among those interested in lumbering and logging and timber lands in northern Wisconsin.

Defendant objected as incompetent, irrelevant and immaterial. The witness not having said that he knew.

A. When the decision was first rendered it was talked of a good deal at this point I told you about, this hard ware store. I frequently heard it talked of there and I think that is where I first heard of the decision my self.

Q. Have you had occasion in your practice to consider the ques-

tion of the title to section sixteen in the Menominee Indian *Indian* Reservation in Wisconsin.

Defendant objected as immaterial.

A. I have.

Q. Were you attorney for Mr. Henry Sherry in certain litigation in which the question of that title and the nature of it was involved.

Defendant objected as immaterial.

263 Yes sir.

Q. Can you tell us briefly what the litigation was and who the parties to it were that you were connected with.

Defendant objected as immaterial.

A. Mr. Sherry came to me, I can't state at just what stage of the proceeding whether it was while the timber was being cut on section 16 or later but it was before the logs were marketed, and consulted me about the matter. My recollection is that it was while the timber was being cut my advise to him was to let the matter go on and cut the logs, that there would be time enough to get the logs after they were run.

Defendant moved to strike that part of the answer out which attempts to give a conversation between him and Mr. Sherry.

Q. The title which Mr. Sherry had was under the State of Wisconsin or from the State of Wisconsin was it not.

A. It was two land certificates at first and I advised him to make no delay, to pay his money and get a patent before we had to take action.

Q. Can you tell me under what claim the parties were acting that cut the logs, the source of their claim.

A. I only know by the result of the proceedings as we went along. We knew well enough that the Indians were cutting the pine under the direction of somebody who was superintending the Indians. What his office was I can't say.

Q. After the logs were cut what proceedings were taken by Mr. Sherry to recover the same.

A. The logs were carried down the Oconto River and we commenced an action of replevin in Oconto County and I think at the time the logs were at Oconto City but I am not sure that they had reached there.

264 Q. At that time who was claiming the logs or who had possession of the logs.

A. James P. Gould had possession of the logs, as owner, I don't mean by his own hand but as owner and operator.

Q. Claiming under purchase from the Indians.

A. I understand that it was under the Indians' claim whether the Indians made a conveyance or some officer in charge of the Indians made a conveyance I don't know.

Defendant moved to strike out the answer.

Q. Your action of replevin commenced by Mr. Sherry was against who.

A. James P. Gould is the man who had possession of the property.

Q. And that was commenced in what court.

A. Oconto County Circuit Court, Wisconsin.

Q. Now by whom was the defense in that action ultimately assumed and carried on.

A. By B. A. Walker attorney of the United States of the eastern District of Wisconsin, as attorney and as appears by the proceedings by authority of the United States.

Defendant objected.

A. Mr. Walker filed a petition stating the nature of the case and the propriety of its being tried in the Federal Court and I didn't drive him into any motion but consented on the filing of the petition that the order be made.

Q. Was the case thereafter tried and disposed of in the United States District Court.

A. It was in the United States District Court for the Eastern District of Wisconsin.

Q. What was the result of that litigation.

A. The result was that Mr. Sherry recovered a judgment for the value of the logs against Mr. Gould, and that the judgment
265 was paid.

Q. Do you recall by whom the judgment was paid.

A. I don't know anything about by whom it was paid. That was not through me I am quite sure and I am not sure it was not.

Cross-examination by Mr. Martin:

Defendant moved to strike out the testimony of this witness as incompetent, irrelevant and immaterial and having no proper bearing upon the issues in this case.

Q. Do you know where the proceeds of that payment went to.

A. I always supposed it went into Mr. Sherry's pocket, my relations with Mr. Sherry were not the ordinary relations of attorney and client quite, ordinarily you would expect that money to come into my hands and I should pay over the proceeds to Mr. Sherry, I don't know whether I ever took any fees out of Mr. Sherry's money at all, he paid my bill regardless of any particular case, I never presented a bill in any particular case, I presented my bill once in six months or once a year so I don't know *nothing* about the payment of it.

Q. Was that case ever appealed.

A. No sir.

Q. It was decided in the Court of Original jurisdiction.

A. No sir. The Court of original jurisdiction was the Oconto County Circuit Court, but it was decided in the District Court for the eastern District of Wisconsin.

A. It was not appealed from one court to another.

A. No sir, removed on account of the federal question, on account

of the interests of the United States in the federal question
266 no appeal was ever taken from that decision.

A. No Bill of exceptions ever settled, no proceedings what-
ever taken after the judgment accept the payment of it as I suppose.

Complainant offered in evidence Ex. No. 53, being certified copies
of the Complaint, Answer and Judgment in the case of Henry Sherry
vs. James P. Gould.

Defendant objected as incompetent, irrelevant and immaterial.

The complainant called HENRY SHERRY, who being duly sworn
testified as follows:

Direct examination by Mr. Hollister:

Q. You- name is Henry Sherry.

A. Yes sir.

Q. Where do you reside.

A. Neenah, Wisconsin.

Q. How long have you lived in Neenah.

A. Since 1849, 67 years.

Q. Have you been more or less engaged in the lumber business
in Wisconsin.

A. Yes, since 1871.

Q. For how many years after that time were you actively engaged
in the lumber business.

A. Well until 1897.

Q. During your experience as a lumber man had you any connec-
tion with what are called school sections on the Menominee Reserva-
tion.

A. Yes sir.

Q. Did you deal with these sections or parts of them quite
267 extensively.

A. Yes sir.

Q. You are the Mr. Sherry who Mr. Hopper testified about with
respect to the law suit which he conducted.

A. Yes sir.

Q. Do you now own any so called school sections in Wisconsin.

A. No sir.

Q. Did you ever hear of a case of Beecher vs. Wetherby.

Defendant objected as immaterial.

A. Yes sir.

Q. Do you know, Mr. Sherry, whether or not that case was well
known among the lumber men of Oshkosh and vicinity.

A. Yes it was.

Q. What did the lumber men generally in this vicinity, the vicini-
ty of Oshkosh understand the case of Beecher vs. Wetherby to deter-
mine as to these school lands.

Defendant objected as incompetent, irrelevant and immaterial.

A. We supposed that settled the title in the state at that time.

Defendant moved that the answer be stricken out.

Q. And after that decision did you personally deal in these school lands relying upon the decision in that case.

Defendant objected as incompetent, irrelevant and immaterial.

A. Yes quite extensively.

Q. Was the judgment which you obtained in the District Court for the Eastern District of Wisconsin, the United States Court, paid.

268 A. Yes sir.

Q. I refer to the judgment in the case of Sherry vs. Gould.

A. Yes sir.

Q. Who paid it.

A. Why the United States.

Q. Did you sell some school land to either S. W. Hollister or Hollister, Amos and Co.

A. Why I didn't do it directly, it was through Mr. Cameron and my lawyers.

Q. Who was Mr. Cameron.

A. He was assignee of my estate.

Q. Do you recall, Mr. Sherry, how much money either Mr. Hollister or Hollister, Amos and Co. paid you for the school lands they bought of you.

Defendant objected as immaterial.

A. \$23,000, or something like that. I can't tell just exactly.

Q. Do you remember about when that transaction was.

A. That is only part of it. They bought some more, or Hollister did, of another party that my estate was connected with.

Q. Do you remember about when that transaction took place.

A. Why I should think in 1900, 1899, or 1900. I am not sure on dates now.

Q. How old are you now.

A. I am 78 and 79 next August.

Q. During the time you were dealing in these lands did you ever hear of a decision by the Interior Department or Land
269 Department at Washington regarding these sixteenth sections.

Defendant objected as incompetent, irrelevant and immaterial.

A. Only that of Wetherby, that is all I know of Beecher vs. Wetherby case.

Cross-examination by Mr. Martin:

Q. In what form was the judgment in your litigation with Gould paid.

A. Well some one was sent from Washington to sell the the logs.

A. I mean was the payment in cash or by check.

A. I can't tell.

Q. Who paid it to you.

A. Why the agent from the Government I think, I think so.

Q. That happened a long while ago and your recollection is not very clear on the proposition. The Government wasn't a party to that suit.

A. Yes.

Q. Was a party to the suit.

A. Why yes, Jenkins decided it.

Q. The Government was not a litigant.

A. We commenced the suit against the Government.

Q. Against Gould didn't you.

A. Yes, but he bought of the United States.

Q. Who was Gould.

A. J. P. Gould, he is a manufacturer here in the city.

Q. Mr. Gould was just a private individual when you commenced this suit against him, wasn't he.

A. Yes sir.

270 Q. He wasn't a Government official.

A. No sir.

Q. You didn't sue him as a representative of the Indians or the Government.

A. He claimed the logs.

Q. He personally claimed title to the logs.

A. Yes sir.

Q. Now you say that you relied on the decision in Beecher vs. Wetherby and after that decision purchased some school sections in the Menominee Indian Reservation.

A. That was my first commencement.

Q. When was that case decided if you recall.

A. In 1880, wasn't it.

Q. I don't know.

Q. And what lands did you purchase after that time.

A. Oh, I commenced quarter sections but after that two or three sections.

Q. Did you buy any before Beecher vs. Wetherby was decided.

A. I bought 3 or 4 forties of the State.

Q. Prior to the time of the decision in the case of Beecher vs. Wetherby.

A. After that.

Q. Did you buy any prior to that.

A. I don't think I owned any.

Q. Are you sure of that.

A. I don't know about dates. I am not good on dates, but talking about my case in Milwaukee before Judge Jenkins, what settled me on the title more than anything else.

Q. It was the case of Sherry vs. Gould.

A. Yes.

Q. That settled you more than anything else.

271 A. Well that is what I went by more than anything else. I made a big purchase after that.

Q. Was that before or after Beecher vs. Wetherby.

A. That was afterwards.

Q. That was long afterwards.

A. Yes sir.

Q. Then the question was not clear in your mind until the case against Mr. Gould was decided.

A. I thought it was.

Q. That is what settled you. Your largest purchases were after the decision in the case of Sherry vs. Gould.

A. Yes sir.

Q. Did you understand by the decision in Beecher vs. Wetherby that the State could give absolute fee simple title to the land.

A. Well there was the question of right of occupancy. I didn't know how far that went.

Q. You knew there was the question of the Indian- right of occupancy involved.

A. Well, making farms.

Q. And a purchaser from the States could not go on the land and cut the timber until the Indian- right of occupancy had been extinguished.

A. Yes, I thought they could.

Q. Did Beecher vs. Wetherby throw any light on that subject.

A. I didn't look into it much at that time. It was my own case.

Q. It was your case you depended upon.

A. I depended upon the other case, too.

Q. What proposition did you depend upon as decided.

272 A. I thought the State owned all the sections 16 throughout the whole State and I didn't think the Government had any claim to it.

Q. Except for the right of Indian occupancy.

A. Well I don't know I thought much of that at the time, but I thought that suit settled it in the State.

Q. Did you ever read that case, or just rely on what the lawyers told you.

A. I attended the court.

Q. I mean Beecher vs. Wetherby.

A. I wasn't so familiar with that. I was a small dealer at that time and I didn't pay much attention to it, only I thought it was settled the sixteenth sections were in the State of Wisconsin. That is what I thought.

Q. That is what you were told.

A. Why yes, told so and by reading the papers and everything else.

Q. You didn't read the decision itself.

A. No, I don't think I did; I might.

By Mr. Thompson: In purchasing lands you did get the advise of your attorneys.

A. Yes, Mr. Hooper has always been my attorney here.

By Mr. Hollister: The knowledge that you had regarding Beecher vs. Wetherby was what you gathered up by common talk among the lumbermen in this part of the country, wasn't it.

A. Yes.

Q. And from the loggers.

A. Yes, Beecher himself, I think.

By Mr. Martin: You dealt perhaps as extensively in these school sections *and* any other man, did you not.

273 A. I don't know.

Q. You dealt quite extensively in them.

A. Yes, I might say five years. I owned section 16 in Shawano County. I suppose the same kind of question arose. I bought that on a tax title from the County and then afterwards picked up some from the State. Everybody up that way considered that the sixteenth sections belonged to the State on the reservation.

Q. Are you the Mr. Sherry who is referred to in Ex. F. attached to the complainant's bill in this action.

By Mr. Hollister: He is.

By Mr. Martin: Mr. Sherry, was any money ever placed in escrow, any money being the proceeds of the sale of lumber the title to which was in dispute between you and the Indians.

A. By whom.

Q. Put in escrow by the parties. Just agreed to be put up and held until the question was determined.

A. I never heard of such a thing.

Q. Never was held by the Indian Agent.

A. No sir.

Q. Or held by anybody for the parties who were claiming the timber.

A. No sir.

By Mr. Thompson: Do you recall, Mr. Sherry, whether during the time that you dealt in section 16 lands on the Menominee Reservation whether or not you paid taxes on it to the State and County.

A. Why yes.

274 Defendant objected as immaterial.

A. Yes, we paid State taxes.

Q. I mean it was assessed and taxed for State, County and Town taxes.

A. Yes, I can't tell you how much, but we paid taxes.

The complainant called C. F. HOPPER, who, being duly sworn, testified as follows:

Direct examination by Mr. Hollister:

Q. You reside in the City of Oshkosh.

A. I do.

Q. How long have you lived here.

A. About 40 years.

Q. What is your present occupation.

A. Bookkeeper.

Q. For whom.

A. Hollister, Amos and Co.

Q. How long have you occupied that position.

A. About twenty years.

Q. What part of your life had been devoted to associations with the lumbering business connected with the Wolf River in Wisconsin.

A. Practically all my life excepting 7 years.

Q. Were you bookkeeper for the Hollister Amos Co. in 1899.

A. I was.

Q. At that time did that company or S. W. Hollister purchase some land in the sixteenth sections in the Menominee Reservation.

A. They did.

275 Q. Have you in your possession the deed evidencing that purchase.

A. I have.

Q. Will you give me the deed please (Witness produces deed).

Q. Will you examine Complainants Ex. No. 55 and state whether or not that is the deed evidencing the conveyance of some of that land from J. W. Cameron and Abbie Sherry to S. W. Hollister.

A. It is.

Q. Examine Ex. No. 54 and state whether or not that is a deed from Hiram Smith and wife to S. W. Hollister and Frank Amos of certain parts of sixteenth sections in the Menominee Reservation.

A. It is.

Complainant offered in evidence Exs. 55 and 54.

Defendant objected as immaterial and irrelevant.

It was stipulated that they may be read into the record with the same force and effect as if the originals were left here.

Ex. No. 55.

Whereas one Henry Sherry did on the 17th day of November, 1897, make a general assignment of all his non exempt property to me J. W. Cameron for the benefit of his creditors, and

Whereas I consented to take upon myself the faithful discharge of the several trusts specified in such assignment and gave properly approved bonds therefor which I duly filed, and

Whereas the real estate hereinafter described was and now is proposed by me to be part of the estate so conveyed to me in trust by such assignment.

Now therefore I, J. W. Cameron acting as such assignee do hereby sell and convey unto Seymour W. Hollister for the consideration of twenty-two thousand five hundred dollars to me in hand paid,
276 the following described real estate situated in the counties of Shawano and Oconto, State of Wisconsin, to wit:

The N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, The N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Section 16, Township 30 north of Range 16 east, the entire N. E. $\frac{1}{4}$, the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$. The S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ the N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, the S. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of Section 16, township 30 north of range 15 east, together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining to the reversion and reversions, and all my right and remainders, rents, issues and profits thereof and all my right, title and interest, claim or

demands whatsoever as assignee either in law or equity, either in possession or expectancy of and in and to the above bargained premises with the hereditaments and appurtenances. To have and to hold the said premises above described with the hereditaments and appurtenances unto the said Seymour W. Hollister his heirs and assigns forever. And I the said J. W. Cameron for myself, my successors in trust, do covenant, grant, bargain and agree to with the said Seymour W. Hollister, his heirs and assigns, that the above bargained premises in the quiet and peaceable possession of the said Seymour W. Hollister his heirs and assigns, against all and every other person or persons lawfully claiming the whole or any part thereof by, through or under me and none other I will forever warrant and defend. And I, Abbie Sherry, wife of said Henry Sherry, who made said general assignment unite as grantor herein in token of relinquishment of my right of dower in said premises.

In witness whereof J. W. Cameron and Abbie Sherry have hereunto set their hands and seals this 8th day of September,
277 1899.

J. W. CAMERON,
*Assignee for the Benefit of Creditors
of Henry Sherry.*
ABBIE SHERRY.

Signed, sealed and delivered in presence of

E. P. SHERRY.
B. D. McDERMOTT.

The deed contains the acknowledgement of the above grantors. It also contains the certificates of the Register of Deeds of Oconto County showing it was recorded in his office on the 25th day of November, 1889, 8 A. M. in Vol. 71 of deeds on pages 384 and 385, and also the certificate of the register of deeds of Shawano County showing it to be recorded in his office on the 27th day of November, 1899, at 9 A. M. in Vol. 45 on page- 584 and 585, and also contains \$23 in cancelled revenue stamps.

Ex. No. 54.

Hiram Smith and Vesta his wife grantors of Neenah, Winnebago County, Wisconsin, hereby convey, and warrant to S. W. Hollister and Frank Amos comprising the firm of Hollister Amos and Com. grantee of Oshkosh, Winnebago County, Wisconsin, for the sum of two thousand and sixty eight dollars, the following tract of land in Shawano County, State of Wisconsin, to wit: The S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Section 16 in township 30 north of range 15 east, according to government survey. Subject however to any adverse claim or right or title in and to said lands which the United States or the tribe of Menominee Indians or chief or head men of said tribe

may have and against which the said grantors do not hereby guarantee.

278 Witness the hands and seals of said grantors this 21st day of October, 1899.

HIRAM SMITH.
VESTA SMITH.

In the presence of
HARRIET B. SMITH.
MRS. MOSINA HABEN.

The deed was duly acknowledged before a Notary Public and contains the certificate of the Register of Deeds of Shawano County showing it was recorded in his office on the 17th day of November 1899 at 8 A. M. in vol. 46 of Deeds page 294, and contains \$2.50 in cancelled revenue stamps.

Complainant offered in evidence certified copies of the township plats with the dates of survey of the township lines and subdivisions and the approval as shown therein being Exs. 56 to 66 inclusive.

Complainant offered in evidence blue print marked Ex. No. 67 as being a blue print from the standard map of Wisconsin made by B. H. Lampert a civil engineer for use on the hearing of this case and the same having omitted therefrom the cities, railroads and other roads the sole object being to enable the parties hereto to conveniently locate positions and places within the distances included in this partial map of Wisconsin and the same being subject to correction by the introduction of other maps if any errors are contained therein. Complainant offered in evidence Exs. 68 and 69 being maps the same as are attached to the defendant's brief on the original motion to dismiss the complaint, and it being understood that the same are received in evidence subject to any correction which either party may desire to show.

It was stipulated that the exhibits attached to the complainant's bill in this case being Exs. A, B, C, D, E, F, G, H, I, and [J.]* having been admitted in the defendant's answer herein are to be
279 considered as in evidence with the same force and effect as if the originals or certified copies had been offered at this time with leave to either party to show any corrections in case of errors in the copies attached to the bill.

The Complainant recalled A. S. NICHOLSON, who testified as follows:

Direct examination by Mr. Eberlein:

Q. I show you pages 145 and 146 of the letter copy book in your possession and ask you whether those two pages contain all of the letter under date of Nov. 6th, 1897, written by D. H. George the then Indian Agent to the Commissioner of Indian affairs at Wash-

Defendant objected as immaterial.

[*Erased in copy.]

ington, D. C., referred to by Mr. George in his testimony at Shawano.

A. I couldn't answer that the way you put it because I don't know. These are the official records of the office.

Q. See whether one part follows the other in natural sequence.

A. Seemingly the pages contain one letter and the wording is in sequence.

Q. And they appear in and are part of the letter book which you produce and which is a part of the files of your office at Keshena.

A. I testified they did, yes.

Q. I now ask you to read that letter so we can get it into the record.

"GREEN BAY AGENCY,
KESHENA, WISCONSIN,
Nov. 6th, -7.

280

Hon. Commissioner of Indian Affairs, Washington, D. C.

SIR: I have the honor to acknowledge the receipt of your communication of November 1st, land 43-4008-1897, relative to the sixteenth section in the township comprising the Menominee Reservation. In reply would say that I understand from your letter that the Menominee Indians have the same privilege of cutting and banking timber under act of June 12th, 1890, 26 Chap. 146, from the sixteenth sections of the Menominee Reservation as from any other portions of the Reservation. If I am correct in my conclusion I desire to give the Indians contracts under the act of 1890 to cut and bank logs from the sixteenth sections of the Menominee Reservation during the logging season of 1897-98, but before letting any contract to cut and bank timber upon these sections I respectfully ask for definite instructions as to whether I shall or shall not allow the Indians to cut this timber. The timber on some of the sections is in constant danger from fire as the timber from surrounding land has been cut and if the Indians are to receive the benefit from the timber it should be cut this winter.

I respectfully ask for further information.

I remain,

Very respectfully,

D. H. GEORGE,
U. S. Indian Agent.

Complainant offered in evidence that letter.

Q. I now show you Ex. No. 70 and ask you what that purports to be.

A. Purports to be a letter written by the acting Commissioner of Indian Affairs dated Nov. 12th, 1897, to D. H. George, E. S. Indian Agent Keshena, Wis., in answer to the letter of Nov. 6th which I just read.

Q. This Ex. No. 70 is that among the filed of your office.

A. This was taken from the official files of my office in answer to your subpoena.

Q. And there is not any question but what this letter was received by Mr. George from the Commissioner of Indian Affairs.

A. I wouldn't question it.

Q. Please read that into the record.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, Nov. 12th, 1897.

C. F. L.

In reply to the following land: 46-936-1897.

D. H. George, Esq., U. S. Indian Agent, Green Bay Agency,
Keshena, Wis.

SIR: I am in receipt of your report of Nov. 6th, 1897, in which you refer to office letter of Nov. 1st, 1897, concerning the rights of Menominee Indians in the occupancy and use of the sixteenth sections of land within their reservation.

You construe my instructions as confirming the rights of the Indians to cut timber on this sixteenth sections, and ask 282 whether or not you shall permit the Menominees during the present logging season to cut the timber from said sections under the act of June 12th, 1890, (26th-146). In reply I have to say that you totally misapprehend the position of this office on the question. The office stated that the Menominee Indians received by their treaty only the right of occupancy of all lands within their reservation. By acts of Congress the State of Wisconsin had previously to the final setting apart of this reservation been granted the sixteenth sections this was subject to the Indian right of occupancy. The Indian right of occupancy does not carry with it any right to cut timber for the purposes of sale or to open lines except for the use of the Indians on the reservation. By the act of June 12th 1890, (26, Chap. 146), the United States gave as a gratuity to the Menominee Indians the right to cut and sell the timber on their reservation. The effect of this act was merely a relinquishment by the United States of this reversionary interest in the timber upon that part of the reservation to which the United States held the fee simply title, it was not the purpose of Congress by that act to give away to the Indians the timber upon the sixteenth sections which would become the absolute property of the State on its being wrongfully severed from the soil.

You are therefore instructed that it would be a trespass against the State to permit the Indians to cut timber on the sixteenth sections within their reservation except for such purposes as may be necessary to give them the full enjoyment of their occupancy right of the land.

Very respectfully,

A. C. TONNER,
Acting Commissioner.

283 Complainant offered in evidence that letter.
Defendant objected as immaterial.

Q. Mr. Nicholson, this man, L. W. Kemnitz, has been operating upon this reservation how long.

A. I think since 1912.

Q. As I understand you the trees which he is permitted to cut are all first designated by someone under the authority of the United States.

A. They are.

Q. He entered upon Sec. 16-29-14, and removed therefrom certain timber used in his business aggregating how many thousand feet.

A. Well I want to correct my testimony of yesterday and I spoke to you about that.

Q. This relates merely to the stumpage that Kemnitz got on that section.

A. Approximately ten thousand feet.

Q. He paid from \$55 to \$65 per thousand stumpage in the tree.

A. He did.

Q. He has cut considerable quantities of rock elm and pine similarly marked from various parts of that reservation.

A. He has.

Q. The sole purpose of his cutting this timber suitable to his needs with the approval of the department has been to sell at a good price stumpage, a certain class of timber upon that reservation.

A. No, sir, if — is a manufactured product it is hewed into square timbers or sawed into squared timbers.

Q. He has his own logging crew and pays for the cutting himself.

284 A. He has his own hewers, there is other processes that it goes through before it reaches the hands of the hewers.

Q. Who does the original cutting from the tree.

A. The Indians and loggers on the reservation.

Q. What has Kemnitz got to do with the cutting of the tree- which ultimately go into timber which he removes from the reservation.

A. The selection of the tree that he thinks will answer the purpose and the tree is then felled and the timber length proceeded to be ascertained by an examination of the butt and top.

Q. Who pays for the sawing down of that tree.

A. He does.

Q. Who pays for preparing the tree into timber.

A. He has to pay all the costs of logging if that is what you wish to get at.

Q. In other words this logging is all paid for by Kemnitz.

A. Yes in addition to the price.

Q. Per thousand feet stumpage.

A. He pays all the cost of logging and loading in the car in addition to that price, in other words that is net with the exception of the overhead charge that we charge for on our books.

Q. Now then he goes under your supervision to various places in that reservation and picks out certain trees which are suitable to his needs which have been marked for cutting by the department and makes that his sole business in getting those trees out to market.

A. So far as we are concerned.

285 Q. In many places Kemnitz has removed pine for his needs and those parts of the trees unsuitable for his needs were taken by the Indian Mills, at the regular stumpage value paid by Kemnitz for those logs taken at the mill as unsuitable for him as any other logging being done in the vicinity.

A. Any tree felled or any timber felled by him he has to pay the full stumpage price whether it is taken or not.

Q. My question was directed more to this inquiry that he takes those trees under your supervision from various parts of the reservation.

A. Yes sir.

Q. At which no other logging is being carried on except this logging in getting those trees out for the market.

Q. That is not so, he only takes the trees from where logging is going on.

Q. That is as you cut a part of the timber for other purposes those suitable to his needs are taken out by him.

A. Yes in other words he *preceeds* the sawyer as a general thing taking the first selection and in due course of time the logging will follow over where he has cut it.

Q. That is it may take some years before the regular logging crews get to the locations where he has removed the pine and rock elm.

A. A year has passed in one instance.

Q. You have with you the estimates of the timber on section sixteen.

A. I have.

Q. I show you Ex. No. 71, consisting of ten pages.

A. Each covering one school section.

Q. On the Menominee Reservation and ask you whether that Exhibit contains an estimate of the timber upon each of those sections as made by the United States.

A. They do, and signed by myself and superintendent of logging who had direct charge of that estimating crew.

286 By Mr. Eberlein: The only part of that exhibit that we are now offering is the estimate of the timber, any other statement or mark upon the exhibit has not been offered.

Q. The claim that you made to sec. 16-29-14 was the same claim that you asserted and now assert in behalf of the United States to all the school sections on the Reservation.

A. They are.

Q. And you intended to make the same disposition of the timber on all of the school sections of the reservation in the due course of time as you intended to make or were about to make on sec. 16-29-14.

Defendant objected as immaterial and incompetent.

A. Unless the instructions from my superior were to the contrary.

Q. And the proceeds of the timber that you were about to cut and threatened to cut on 16-29-14 and the other sections if converted into proceeds you intended to pay into the Indian fund the same as

proceeds derived from timber from the other lands on the Menominee Indian Reservation.

Defendant objected for the same reasons as above.

A. I can't answer that, Mr. Eberlein, because the regulations might change.

Q. You intended to do it at the time.

A. I intended to pay it into what ever fund the law and regulations provided for.

Q. But you intended to pay it into the same fund.

A. Would undoubtedly go into the Indian fund.

Q. In fact the moneys you did receive from 16-29-14 was paid into the same fund that the moneys received from timber cut from
287 the other lands on the Menominee Indian Reservation was paid into.

Defendant objected as immaterial.

A. I am unable to state, I couldn't tell you what fund the other moneys went into.

Q. Well you in all instances paid the moneys received from the sale of the products from the Menominee Mills into the treasury of the United States for the Benefit of the Indians.

A. Into the treasury of the United States but the Indians have separate funds.

Q. What did you do with the money that you received from Kemnitz for the logs he cut on 16-29-14.

A. Deposited with the treasury of the United States to the credit of the Menominee Indians.

Q. What did you do with the money that you received from Kemnitz, about the same time for other timber that he cut upon other parts of the reservation, not on section 16.

A. Deposited to the credit of the Treasurer of the United States, to the credit of the Menominee Indians.

Q. In other words those moneys were deposited exactly in the same way.

A. They were.

Q. Is it not a fact when you deposited the money from 16-29-14 that the Treasurer of the United States didn't know whether that came from timber upon one section or from another section.

Defendant objected as incompetent and irrelevant.

A. He wouldn't know what section the money came from.

Q. The same is true is it not of the other moneys you received from timber which came from 16-29-14 and went through the mill and sold to the public.

288 A. It is.

Q. Unless ordered to the contrary your intentions were to place all of the money received from 16-29-14 and the other school sections in the same fund in the same manner.

A. It was.

Q. The moneys received from 16-29-14, were they mingled with moneys received from the sale of products from the other sections.

A. They were.

Q. Even before you deposited it.

A. They were. For your information the money is held separate on the books of the operation so it can be identified, under instructions from the Office.

Q. Since this suit was started.

A. No, before the suit was started.

Q. Were you instructed by the office to log those sections, and keep an itemized statement of the amount of timber cut from each of those sections.

A. No sir.

Q. When did you first receive word from the office that you were supposed to keep an itemized statement of the amount of timber cut from school section 16.

A. Some days after we took the matter up with the office.

Q. At that time all the cutting had been done.

A. Yes sir.

Q. So prior to your cutting you had received no authority either to cut or to hold the proceeds separate.

A. Why I had general authority that permitted my cutting certain designated territory.

Q. The reason that 16-29-14 was about to be cut at that time
289 was because it was closely situated to the tract, isn't that correct.

A. The right of way of the railroad run through it.

Q. That was the reason why that section rather than other sections were then threatened to be cut, is that correct.

A. Well that was not the particular reason, the three camps were located about equal distance apart and would cover the timber in the territory designated to be cut.

Q. You have a camp and railroad over close to section 16-20-15, have you not.

A. Well we have a camp on sec. 20, which adjoins 16-30-15, and the railroad into that camp has since been removed.

Q. But in 1912, that camp and railroad was then there.

A. They were.

Q. What cutting if any did you do on that particular section 16, last referred to.

A. There was no cutting done there because we couldn't reach that timber from that tract, that is across the Evergreen.

Q. Prior to your coming to the Menominee Indian Reservation how long had that mill been in operation.

A. They started operations in January 1909.

Q. How many years before you came there.

A. A year and a half.

Q. Who was the superintendent who preceded you.

A. A. M. Riley directly in charge of the Menominee Mills and A. E. Baniff preceded Mr. Riley.

Q. Prior to the starting of those mills for how long a period pre-

ceding that time has logging been carried on on that reservation, preparatory to having the mill stocked.

290 A. 1905, I think the records will show the first cutting was done in what is termed the Blown Down District.

Q. Is it not a fact prior to your going there in 1810, no effort before was made by Riley or Baniff to reforest any of the lands cut over.

Defendant objected as incompetent, irrelevant and immaterial.

A. I couldn't find any trace of ref-estration except the natural—

Q. Is it not a fact that timber cut prior to your going to this reservation was cut the same as other loggers do, every thing that is merchantable being taken out regardless of reforesting.

A. No that is not a fact, they cut all marked timber and undoubtedly timber was cut that was not marked.

Q. Is it not a fact immense quantities of brush and slashings were left on those cut over lands by those men.

A. There *is* slashings on the land where the cutting took place.

Q. Containing all the brush cut from the trees at that time.

A. Some brush yes.

Q. Is it not a fact that makes reforesting and natural reproduction almost impossible by virtue of the danger from fire.

A. No, I don't think so, I wouldn't say that.

Q. As a matter of fact *in* does make a very dangerous situation in those localities.

A. It is dangerous if fire gets in there.

Q. And fire does get in.

A. The slashing and brush is good for the soil.

291 Q. But the brush there might make it a dangerous place for fire.

A. If the fire got in there it would furnish something for it to run in.

Q. That is not in accordance with good forestry except in certain swampy places.

A. Well, it would depend entirely upon what instructions regarding good forestry was at that time.

Q. Well, the instructions of today require burning and scattering.

A. The instructions of today require burning of brush in such places as we deem might create danger and scattering and lapping in other places.

Q. Those other places are low swampy places.

A. Most of them, yes; on the hill side where there is danger of soil erosion.

Q. You know the value of cut over lands similar to the ones on Sec. 16-29-14, in that community do you not.

A. I do.

Q. What do you figure the lands on Sec. 16-29-14 would be worth after the cutting of the timber per acre.

A. An average of ten dollars per acre.

Q. I am speaking now of 16-29-14; that is very poor soil.

A. Well, that would have the same average as the others.

Q. I am speaking about the entire section, wouldn't it be more than \$5 an acre.

A. No more than that. I think \$10 an acre, take Sec. 16 as a whole without specifying any particular forty as a fair value.

Q. Some of those forties on that section are rough so as to make agriculture impossible.

A. Unless drained.

Q. That class of lands to be drained is expensive in northern Wisconsin.

A. It might be so considered. I would like to correct my testimony in regard to the acreage cut on section 16.

Q. Now instead of offering in evidence this Ex. No. 71, I will ask you to give the total amount of timber upon Sec. 16-28-15.

A. Town 28 north of range 15 east, Sec. 16, total of 90 thousand board feet, 200 railroad ties.

Town 28 north of range 16 east, Sec. 16, 30 thousand board feet, 70 cords of wood.

Town 29 north of range 13 east, Sec. 16, three million one hundred and three thousand board feet, 4110 cords of wood.

Town 29-14-16 Six million one hundred and thirty thousand board feet, five hundred poles, eleven hundred posts and ties, 1350 hemlock ties.

Town 29-15, Sec. 16, 247 thousand feet, 100 railroad ties.

Town 29-16, Sec. 16, 7 thousand board feet.

Town 30-13, Sec. 16, 1877 thousand feet, 1025 poles, 1145 cords of hard wood, 140 railroad ties.

Town 30-14, Sec. 16, 8,354,000 board feet, 413 feet of poles 768 cedar posts, 602 cords of hard wood.

Town 30-15, Sec. 16, 9,730,000 board feet, 980 cedar trees, 1300 cedar posts, 2380 railroad ties.

Q. Of the amount just read on sec. 16-30-15 how much of that was white pine.

A. Five million and 62 thousand.

Town 30-16, Sec. 16, Two million 89 thousand board feet, 200 feet of poles, 2550 cedar ties.

Q. Now you want to correct your testimony as to the acreage cut on 16-29-14.

A. Yes; I testified approximately seven acres of land, cut there. I desire to correct my testimony and state that on Sec. 16 the cuttings around camp 15 embrace $2\frac{67}{100}$ acres including that part of the Menominee Indian Railroad lying within its confines and that the entire acreage out side of the site of the camp equally $2\frac{97}{100}$ acres more, making a total of $5\frac{64}{100}$ acres.

Q. What are you now refreshing your memory from.

A. From a survey and actual measurement made through my instructions of this location.

Q. You never measured this yourself.

A. I assisted and supervised the measurements.

Q. You were not on the ground when these measurements were made.

A. Not all the time.

Q. The only information you have concerning the accuracy of this is what you were told and by having been on the premises and not having made any measurements yourself, is that correct.

A. And that map having been drawn to a scale by a civil engineer and surveyor.

Q. In other words, the truth of this map depends upon the truth and veracity of the man who made it said or told you.

A. I verified it by pacing the principal distances.

Q. When did you do that.

A. Yesterday.

Q. You were up on this section yesterday.

A. Yes, sir.

294 Q. You state that the acreage you now say has been cut is about right.

A. True and correct; that is the smallest camp site we have on the reservation. You asked me the question and I admitted from memory that there was a greater site cut there than is ordinarily when as a matter of fact its smaller.

Q. Do I understand you to say now within an acre of 5 64/100 acres that all the timber of every kind and description has been cut.

A. There might be an individual tree outside of that.

Q. Not what might be, you were there yesterday; what is the fact.

A. There probably is an individual tree. Let me amend that; there have been some trees of which you have scale, some individual trees.

Q. Out beyond this five acres you speak of.

A. Yes.

Q. Within this five acres that you speak of everything has been cut, trees of all sizes and dimensions, isn't that true.

A. Yes, sir.

Q. So there is not a living thing upon that five acres.

A. Nothing; it had to be cut for the purposes of the right of way and camp site.

Q. Is it not a fact down southwest a large quantity of cedar has been taken.

A. No; a very small quantity of cedar posts were cut out of a swamp about northeast of the camp.

Q. Have you any idea how many individual trees were cut to the east and north and west of this clearing.

A. I have the figures.

295 Q. How many thousand feet.

A. They were embraced in that scale I testified to.

Q. You don't know how much came from this clearing and how much came from beyond it; there is no way of knowing that.

A. Yes, there is a way of knowing it; I haven't the figures here.

Q. Well, the percentage.

A. The percentage that was cut outside of that acre is so minimum as to be almost nil.

Q. Where did Kemnitz cut his trees.

A. About here.

Q. Way out side of that acre.

A. Yes.

Q. Forty acres away.

A. Way out in here almost on the edge of the line.

Q. Kemnitz got his pine more than 40 acres to the west.

A. Not more than forty acres.

Q. But right near the western line of the section.

A. Near the western line of that forty.

Q. These camps are located near the eastern line of that forty.

A. Southwest corner of that forty.

By Mr. Thompson: In addition to what was cut within the limits as shown on your plat there was some individual trees cut outside of that and around it.

A. There was some trees cut which your man testified we used in building this barn.

Q. Some of those were cut north of that.

296 Q. *Some of those were cut north of that.*

A. They were cut possibly in these angles, that is what causes those various angles and then there was some pine timber, Mr. Kemnitz was cutting the pine timber along this west line and they ran over and cut about ten that were right along this line.

Q. Then there was the cedar taken out of the swamps.

A. There was some cedar swamps cut by me out of the swamp. The swamp shows on this map but not here. You can see it here, a little cedar swamp on this line here right along here, I forget the exact number cut.

Q. That swamp where he cut, those cedar posts would be north.

A. Yes on the east quarter line of the forty.

Q. And north of the circle or outline piece that you speak of as having been cut clean.

A. Yes sir.

Q. Were there some individual trees cut east of that too.

A. Yes there was some trees cut here and here.

Q. You say there was some trees cut here and here, you pointed to west, a little southeast and east and north east of the tract that you have marked there.

A. Yes, a single individual tree. In building the barn we wanted about the same size hemlock logs so if we got one tree here which was eighteen inches diameter and they couldn't get another 18 they would go on and find it here and maybe find one in this corner, here and take it out here. So the trees were gathered and taken outside of this cutting the time they made this clearing. They felled every thing and blew the stumps and then when they came to build the barn they had to go outside of that clearing to get the same size logs that they built the barn of.

297 Cross-examination by Mr. Martin:

Q. Mr. Nicholson since you were on the stand last Friday and Saturday what is any effort have you made to verify your statement and those of other witnesses with reference to the quantity of land that was cleared of timber cut on Sec. 16-29-14.

A. Why I looked up the records that I had made at the time with my assistant.

Q. Made when.

A. At the time we cut and cleared on this section and ran the railroad's right of way through and then yesterday had an actual survey made by a skilled surveyor, civil engineer and surveyor.

Q. Was that survey made under your directions.

A. Yes sir.

Q. Were you present.

A. I was.

Q. Have you the survey which you made yesterday.

A. I have, there is the survey. (Def't's Ex. No. 1.)

Defendant offers in evidence Def'ts. Ex. No. 1.

Complainant objected as incompetent, irrelevant and immaterial, hearsay on the evidence so far offered shown to be inaccurate but we do not object to the defendant making the offer at this time.

Q. Mr. Nicholson, was this survey made and is this plat which has been offered in evidence in accordance with the existing rules and regulations governing surveys and plats of surveys required and in force in your office.

A. Yes sir.

Q. And has that been duly signed and approved and the
298 regulation otherwise complied with.

A. They have.

Q. Have you since last Friday and Saturday made any further search as to the number of trees cut as indicated by this plat and as testified to last week, any further search with reference to the size and age of those trees.

A. I have, I have the original records taken the time the trees were cut the stumps numbered and logs scaled and diameter and measurements taken, and age of the trees.

Q. Have you those records with you.

A. I have, that is the way we ascertain the age of forest growth, the diameter of the tree each one of those rings represents a period in the life of the tree.

It was stipulated and agreed that Def't's Ex. No. 2 may be offered in evidence at this time subject to such objections as complainant may wish to make and the original Exhibit withdrawn after having been fully described.

A. I have no objections to leaving those here.

Complainant objected to the exhibit as a self serving document, as hearsay, incompetent, irrelevant, immaterial as not covering all of the trees cut but do not object to the defendant making the offer at this time.

Q. Mr. Nicholson describe fully and in detail what Def'ts. Ex. No. 2 is.

Complainant objected as incompetent, irrelevant and immaterial, and because they speak for themselves.

A. I have duplicates, these are the originals but I can replace them with duplicates.

Q. Just answer the question.

A. These records show the average age of the forest and the average diameter and measurement of every tree and every log cut on

Sec. 16-29-14 with the exception of some large pine which
299 a scale of was offered in the complainant's testimony.

Complainant moved to strike out the question and answer on the ground that such testimony is incompetent, irrelevant immaterial and a self serving statement, does not cover all the trees cut and the exhibits show for them selves.

A. The notations on the back of the exhibits show the number of the tree the location from which the tree was cut, the height of the stump at the first cut, the diameter and the age of the tree ascertained by actual count, by the lines shown on the opposite side.

Q. What do the lines shown on the opposite side indicate.

A. Each line shown shows one year of tree life from the center of the heart to the outside of the marking. That is one half of the diameter of the tree. A rule laid down there would be the exact diameter. This exhibit represents the average age, the average life of the forest which can be verified by a percentage table against the scale of logs as testified to by me. The smallest tree I believe to be twelve inches in diameter and an age of 154 years against the largest of 25 inches in diameter and 224 years.

Q. Were those trees fully matured at the time they were cut.

A. They were. The open marks in the rings showing the life of the tree show the shake.

Q. What is shake.

Q. Shake is caused by wind or action of the elements which twists or turns a tree or binds it in such a manner that the fiber is separated or broken and such marks as those shown that the tree — hemlock marked No. 10 — show that the tree has passed maturity and is rapidly dying. These were taken in my presence and under

300 my instructions in company with Mr. Lincoln Crowell, supervisor of Forest, U. S. Forest Service, and a Mr. Hamilton superintendent of logging in the U. S. Indian service.

Q. Going back to the camp site on sec. 16-29-14 how does that camp site compare in size with the other camp sites on the reservation.

A. Very much smaller.

Complainant objected as incompetence, irrelevant and immaterial, and moved to strike out the answer for the same reason.

Redirect examination by Mr. Eberlein:

Q. You do not mean to testify that your Ex. No. 2, is complete and contains an impression of every log that was cut on section 16-29.

A. It does not.

Q. You cut in all about 160 thousand feet of timber on that Sec. 16-29-14.

A. Something like that.

Q. And Ex. No. 2 that you offer here is but a small part.

A. It is a- average of all the trees cut.

Q. How do you know they are.

A. By actual eye and caliper measurement.

Q. Where are the rest of them.

A. We do not take them all, we take the average, we count up the various trees and we average them by caliper measurement and then we take one from each of those measurements obtaining the average of them all.

Q. That does not include the pine.

A. I excepted the pine.

301 Q. Nor basswood, nor cedar, these do not include the cedar cut.

A. No, they only attempt to show the average of the forest.

Q. Of the hemlock.

A. Yes, of the hemlock and the forest.

Q. What about the hard wood that was cut on this section.

A. The hard wood would be about the same age as the forest shown there, the average age.

Q. You have not a single one of these cards here that attempts to give an impression of the hardwood cut on this section.

A. No.

Q. You know the growth of hardwood is far different than the growth of hemlock.

A. The life of the forest is the same, hardwood coming first and hemlock, a much faster growing tree, comes along so that they arrived at maturity about the same period.

Q. As a matter of fact there was considerable hardwood cut on this Sec. 16-29-14.

A. A small amount of hardwood.

Q. I further understand you on this clearing where you have your logging camps on Sec. 16-29-14, you cut everything even to brush.

A. The brush was cleared away.

Q. You did not attempt to apply any forestry problems to that job.

A. We did not, not to the camp site.

Q. Then why have you introduced these here. What is the purpose of this when you cut everything, and where are the impressions of the small stuff.

302 A. The purpose of that record is in years to come. Somebody might charge I cut trees down six inches and I would have a living proof and be able to testify to the life of the forest and diameter of the tree.

Q. Is it not a fact on this site you cut everything down, small brush.

A. For camp site purposes, yes.

Q. And that includes, you say, five and a half acres.

A. Yes, 5 and a fraction acres, that includes the camp site and the railroad.

Q. Upon these places that you have cut as indicated by Ex. No. 2 you cut everything regardless of size.

A. For the purposes of right of way and camp site.

Q. Where did those logs come from that are represented by your Ex. No. 2.

A. Those logs came off of all the cuttings of the camp site and right of way of the railroad.

Q. You cut lots of small trees on this clearing for your logging camp.

A. What do you mean by small trees.

Q. 3 or 4 inches in diameter.

A. Brush and slashings were cut; no trees; a tree of tree age was all cut down. Anything else that was on there was brush and small saplings.

Q. Whatever there was there, whether 4 or 6 or 12 or 20, went before the ax.

A. All was cleared clean and stumps blown out by dynamite for the purpose of the right of way and camp site.

Q. Yet you picked out the big ones and got impressions of them and saw nothing about the small ones.

A. If you will look at this you will see that they range from 12 inches, the smallest tree, upward.

303 Q. Why didn't you take an impression of a small one.

A. There was no necessity of taking impressions of the brush and saplings.

Q. You do not wish to be understood you did not cut some trees on the logging site eight inches in diameter on that site.

Q. Any 6.

A. None 6.

Q. Any 4.

A. None 4.

Q. In other words the class of timber upon this site which you cut over is practically all big stuff, six inches and over, and small brush.

A. Brush and young trees, what we call saplings, that have not reached any part of the tree age.

Q. What do you mean by a sapling tree.

A. Inch and a half to two inches.

Q. Do you make impressions of the logs everywhere you cut the same as you did here in Ex. No. 2.

A. I take impressions and measurements of the tree every place where we cut.

Q. So you have on file in your office impressions of practically the average of the trees you cut everywhere on that reservation just the same as Ex. No. 2.

A. Except in certain designated sections where what is known as clean cuttings take place.

Q. Where you don't keep track of what you cut.

A. We don't keep track.

By Mr. Thompson: Now, Mr. Nicholson, going back to this Defts. Ex. No. 1, that is the same map or plat concerning which I examined you a while ago and which you said there was no cutting of individual trees outside of the lines of the clearing to the

304 southeast, east, northeast, and north.

A. Yes sir.

Q. And the same cedar upon which the cedar from the swamp was cut.

A. It is.

Q. With reference to Defts. Ex. No. 2 I would like to ask how many of these cards you made for the cuttings on Sec. 16-29-14.

A. You have all the cards which were made.

Q. Some seventeen are they.

A. Eighteen.

Q. From 1 to 17 and two number ones.

A. Two number ones.

Q. About what was the average number of feet to the tree on that section.

A. I have not got the number of trees here. I have the number of logs.

Q. How many logs.

A. 1,837 logs.

Q. They would run, roughly speaking, about how many to a tree.

A. Six logs to a thousand.

Q. About how many logs to a tree on an average.

A. 3 or 4.

Q. The total number of logs was what.

A. 1,837.

Q. So, roughly speaking, there would be somewhere around 4 or 5 hundred trees at least.

A. About that at least.

Q. And the only card you have for all those trees are the 17 or 18 in Ex. No. 2.

305 A. Yes sir. Those were obtained, as I explained once before, by a caliper measurement.

Q. I find here two number ones. Why is that.

A. Those are separate trees, but both stumps marked No. 1, and the record has never been changed. Each stump is marked so that the stump in the woods can be identified.

Q. Is it an unusual occurrence to have the height of the stump and the D. O. B. size and the age all agree, that was. What does D. O. B. mean.

A. Diameter breast high.

Q. It is the same in both cases.

A. That is not a usual thing, because stumps are usually cut for 14, 15 and 16 inches. Those stumps probably came out of the right of way where they wanted the stumps out of the ground.

Q. A difference of some eight inches or so in the diameter of those trees.

A. Two trees growing in different locations, one probably on dry land and the other in the swamp which affects the fiber of the tree, one a finer grain of wood than the other.

Q. You made no other cards or measurements or data of this kind for any of the other trees cut on that section.

A. By use of caliper measurement on the south side.

Q. You have no record on those.

A. I haven't those with me.

Q. Take tree number 11 from the center of the heart to the outside of the tree wouldn't be much more than 5 inches would it.

A. About five inches.

Q. That is about the smallest one you have brought, is it. Tree Number 4 is very little larger than that. About what was the diameter of tree Number 4.

306 A. Tree Number 4, twelve inches.

Q. Do you think it would be as much as that from the center of the heart to the outside. Do you think that appears there to be as much as that.

A. This diameter is actual caliper diameter and it is possible that it is a little bit blurred there, that that was a little bit lower and might not — got that extra line.

Q. The diameter of the butt as shown there, tree No. 4 is 12 inches and diameter of tree No. 11 is 10 inches.

A. Yes sir.

Recross-examination by Mr. Martin:

Q. Mr. Nicholson, at what age will hemlock mature.

A. 125 years and upward, according to the soil that it is in.

Q. When is a tree at its best for cutting. When is it the most valuable.

A. Well, around 150 years old.

Q. Beyond that age what occurs.

A. Decay and deteriorates. May be shortened or prolonged by various conditions in the ground or elements.

Q. What is the purpose of a camp.

A. House the men, tools and animals used in logging in the woods.

Q. Within what radius do they work from a camp.

A. Anywhere from one to four or five miles.

Q. So that camp 15 erected on Sec. 16-29-14 was used as a basis for cutting logs on land within a radius of 4 or 5 miles from that camp.

A. Yes sir, five years work there. We used it last fall and might be used again this summer.

307 Q. Have you any estimate in your office of the amount of timber by forties of the amount on the school sections in this reservation.

A. I have.

Q. And have you a record in your office showing the general character and contour of the lands.

A. I have.

Indian concession within this State, where any Indian tribe claims any right to or interest in said lands, or in the disposition thereof by the United States, and particularly to determine the title to the lands embraced within section 16 in the several townships constituting the present Bad River or La Pointe and the Flambeau Indian Reservation within this state.

Section 2. This act shall take effect and be in force from and after its passage and publication.

Approved April 20, 1903.

By Mr. Thompson: There is no objection to the volume
310 from which this is offered being authorized and being official
so as to entitle it to be offered in evidence.

By Mr. Martin: No, sir, no objection.

Complainant offered in evidence from the official authorized volume of the Wisconsin statutes published in 1915 by the State of Wisconsin Sections 230 and 232 found on page 175 of said volume of statutes and which read as follows:

Section 230. In the case of the sale of any public lands made by mistake or not in accordance with law or obtained by fraud, such sale shall be void and no certificate of purchase or patent issued thereon shall be of any effect, but the holder of any such certificate or patent shall be required to surrender the same to the commissioners who shall thereupon order the amount paid for the lands described in the certificates or patent, together with the interest thereon from the time of such payment, to be refunded and paid out of the State treasury from the fund to which it has been credited, but no interest shall be paid to any person participating in any such fraud.

Section 232. Whenever any money shall be so paid, or when any money shall be appropriated to any person on account of the failure of the state to furnish a complete title to land sold, the secretary of state shall ascertain how much of the money paid to any county for other than school purposes, and shall at the annual apportionment of state taxes, besides all other taxes, certify such sum as an additional tax to each county, and therewith a description of the land on
account of which such tax is to be levied. The county board
311 of supervisors shall add such certified sum to the state tax
before it is apportioned to the several towns, or to the state tax of the town in which such land is located, according as either the county or such town shall have received the benefit of the money arising from the sale of such land.

The complainant called W. H. BENNETT, who being duly sworn, testified as follows:

Direct examination by Mr. Thompson:

Q. Where do you reside.

A. My home is here at Madison.

Q. Madison, Wisconsin. What official position if any do you hold.

A. Chief Clerk in the state land department of the division of public lands.

Q. Of the State of Wisconsin.

A. Yes sir.

Q. And you have been such officer of the State of Wisconsin for about how many years.

A. Well, about 10 years, 9 or 10 years. I was in the office some time before I was in this position.

Q. Before you were chief clerk of the land office were you in the land office in other positions.

A. Yes sir.

Q. What other positions did you hold.

A. I was assistant clerk and bookkeeper and assistant chief clerk.

Q. Altogether how many years have you been in the land office of the state of Wisconsin.

312 A. 14 years.

Q. Is that 14 years altogether.

A. Well back in 1878 and '79 I was in the office. Four years in the office from 1878 to 1882 when I served as clerk.

Q. In your position as chief clerk of the land office of the State of Wisconsin I will ask you whether or not you are in charge of the land office of the state and the books, records, files and papers thereof.

A. I am.

Q. You are the legal custodian thereof.

A. Yes sir.

Q. Have you in the land office of the State of Wisconsin as a part of its files and records a book giving the descriptions of the school lands claimed to be the property of the state of Wisconsin.

A. Yes sir.

Q. Have you that book with you.

A. It is in the vault.

Q. Could you get it.

A. Yes sir, that is a list of the lands in Sec. 16-28-13.

Q. This is in a book entitled Vol. 2, Educational and other land grants Land Department, Wisconsin, is it not.

A. Yes sir.

Q. And on page 252 thereof are shown entries of descriptions by forties of the different pieces of land in Sec. 16-28-13 East, and in Section 16-28-14, East, and in Section 16-28-15 east, and a part of the forties in Section 16-28-16, the balance of the descriptions of the last section being continued over on page 253, is that correct.

A. Yes sir.

313 Q. This volume is the one which the Commissioner has marked Ex. No. 71 is it not.

A. Yes, sir.

Complainant offered in evidence page 252 and that part of page 253 of Ex. No. 71 which covers the several sections 16 in township 28 ranges 13, 14, 15 and 16.

It was stipulated that the chief clerk of the land office may prepare

copies of that part of Ex. No. 71, now or hereafter offered in evidence and that the same may be received in evidence the same as the original, the copies being duly certified by him to be correct.

Q. Now I notice that the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 16-28-14 East in said Ex. 71, is shown to have been patented Oct. 6th, 1853, is that correct.

A. Yes, sir.

Q. These notations under the head of remarks show the date of such patents when issued to the State grantors do they not.

A. Dates and number of the patent.

Q. First is the patent.

A. Yes.

Q. Then the number of the patent, then the name of the grantor of the state.

A. Yes, sir.

Q. Then the date of the patent.

A. Yes, sir.

Q. Now in many cases where those lands purchased a considerable time prior to the date of the patent, that is was an agreement of purchase made in some form with the State prior to the patent.

A. Yes, in many cases.

Q. Calling your attention again to the entry in regard
314 to the N. E. of the N. E. of 16-28-14, which according to the record was patented by patent number 2776 Fannie B. Hunter Oct. 6th, 1863, and ask you if you have the records in that case showing when that land was contracted to be sold.

A. They are here, yes, sir.

Q. Will you examine agreement or contract with the State for the sale of that land which I believe is called a certificate and tell me when the agreement for the sale of that land was entered into.

A. That contract was dated December 3rd, 1859.

Q. And the application by the party was made when.

A. Made on the 13th day of July, 1859.

Complainant offered in evidence Ex. No. 72 and asked that the defendant consent that a copy certified to by the chief clerk may be substituted for the original in evidence with the same force and effect.

By Mr. Martin: Yes, sir.

Complainant offered in evidence Ex. No. 73 being a certified copy of the patent to this piece of land.

Q. The patents are very nearly alike up to 1909.

A. Yes, sir.

Q. Now you can turn in Ex. No. 71 to the sections in township 29.

A. Yes, sir.

Q. Before you get to that, it appears on page 252 of Ex. No. 71 that no entries are made under column of remarks as to the whole of Sec. 16-28-15, east; who claims the title to the lands in this section, as to which there are no entries under the head of remarks.

A. The State of Wisconsin.

Q. Has any contract or patent ever been issued by the
315 state on any of that land.

A. No, sir.

Q. That land in 16-28-15.

A. No, sir.

Q. There is a column on page 252 of Ex. No. 71, headed date of conveyance by the United States to the State, and underneath that at the top of the column appears the words "May 20th, 1848," which are dittoed down all through all of these descriptions; what does that indicate.

A. That indicates that the state title came upon the adoption of the constitution, all sections 16 becoming a part of the state and should be school lands.

Q. So that the notations in that column show the source of the claim of the State to the title to all those lands.

A. Yes, sir.

Q. Now I notice that in the case of the descriptions on pages 252 and 253 of Ex. No. 71 in Sec. 16-28-15 east, that there is nothing written in the column under the head of remarks except in the case of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and I ask you who claims the title to the other descriptions in that section, and lot 3.

A. You say there is nothing written?

Q. Yes.

A. Now you overlook those ditto marks there.

Q. Well, I will change the question by adding except little marks in pencil being the letter C. I take it.

A. Yes, sir.

Q. What does that indicate as to who claims title to these lands.

A. That indicates that these lands are on contract at the present time and have not been patented, been sold on contract.

316 Q. In whom then is the title of the deed of those lands.

A. Why it is in the state I claim until paid.

Q. And those lands are subject to contracts of sale to purchasers.

A. Yes, sir.

Q. Full payment has not *been* yet been made on those contracts.

A. No, sir.

Q. So those parties are not entitled to a patent until they fully pay up.

A. No, sir.

Q. And the State will not issue a patent until they pay up.

A. No, sir.

Q. Opposite the S. W. of the N. W. in said section in red ink are the words "Patent No. (blank) issued to", what does that mean.

A. That evidently was a clerical error; the clerk apparently thought there was and found there was no patent issued on it and those words would be applicable when the patent is issued.

Q. No patent has been issued.

A. No patent had been issued.

Q. I call your attention to that part of pages 306 and 307 of Ex. No. 71, which cover the subdivisions of section 16-29-13, Sec. 16-29-

14, Sec. 16-29-15 and Sec. 16-29-16 East, and ask you if those are the same kind of entries with reference to this land as those shown on the preceding pages to which I referred.

317 A. Just the same.

Q. And the entries as to those sections show that they are claimed by the state in the same way under the constitution as school lands of the State of Wisconsin.

A. Yes, sir.

Q. And the entries under the column headed remarks show patents issued on all those lands in Sec. 16-29-13 east, do they.

A. Yes, patented.

Q. And they show patents issued for all the descriptions in Sec. 16-29-14 east, do they.

A. Yes, sir.

Q. And they show no entries in the column headed remarks in Sec. 16-29-15 east, do they.

A. No, sir.

Q. What does that indicate as to the title to Sec. 16-29-15.

A. That the title is in the State and there has been no transfer of that title by the State.

Q. No contracts issued on any of that land, was there.

A. No, sir.

Q. I note that in the entries under the column remarks with reference to the subdivisions of Sec. 16-29-16 east that there are no entries in the column except the red ink entries opposite the N. W. of the S. W. excepting the little pencil entry C after the other description.

A. Yes, sir.

Q. And I ask you what part of that land that indicates has been patented by the State.

A. One forty, the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$.

318 Q. And the rest of the land, the subdivisions marked in the column headed remarks with the letter C the title is held by whom.

A. The title is in the State.

Q. And they are subject to the contracts with parties who have entered into contracts to purchase the same.

A. Yes, sir.

Q. Or what you call certificates.

A. Yes, sir.

Q. And those contracts or certificates have not been paid up.

A. No, sir.

Q. And the State will not give them a patent until they are paid for in full.

A. No, sir.

Complainant offered in evidence that part of pages 306 and 307 covering the entries relating to Sec. 16-29-13, Sec. 16-29-14, Sections 16-29-15 and 16-29-16 above referred to and ask you Mr. Martin if you will consent to our substituting in lieu of the original exhibit copies of those entries to be certified to under the hand of the chief clerk of the land office.

By Mr. Martin: Yes, sir.

Q. I call your attention also to that part of pages 249 and 350 of Ex. No. 71 showing entries relating to the different subdivisions of Sec. 16-30-13, Sec. 16-30-14, Sec. 16-30-15 and Sec. 16-30-16, and ask you if those entries are made in the same manner and for the same purposes and show the same things as the entries in regard to the other sections 16 on the other pages of Ex. No. 71 heretofore referred to.

A. They do.

Q. With reference to the entries of the different lands in Sec. 16-30-13, what do the entries show as to whether or not all 318½ those lands in that section 16 have been patented by the State.

A. That patents have all been issued for all the lands in that section.

Q. With reference to the entries in regard to Sec. 16-30-14, what do those entries show as to the issuance of patents by the State.

A. They show that patents have been issued to all of those lands, all of those lands in that section.

Q. By the state.

A. By the state.

Q. With reference to the lands in Sec. 16-30-15 what do they show as to a patent of the lands by the State.

A. They show that they have all been patented.

Q. With reference to Section 16-30-16 what do they show.

A. The same; they have all been patented.

Q. I notice that on page 350 of Ex. No. 71, with reference to the S. W. ¼ of the N. E. ¼ of Sec. 16-30-17 East and with reference to the S. E. ¼ of the N. W. ¼ of the same section there are entries patent number 4512 to Jane E. Baldwin Sept. 5th, 1865, what does that indicate.

A. That indicates that a patent was issued by the State. That is in 17.

Q. Yes, I read it 17.

A. Was issued by the state to that party, the number of the patent is 4512 and dated Sept. 5th, 1865.

Q. I call your attention to a certificate covering that same land and ask you the date when that was issued.

A. Sept. 5th, 1865.

Q. Does that mean that they paid at the time they got the patent.

319 A. Yes they paid in full.

Q. That was practically a cash sale.

A. A cash sale but the custom was at that time when a cash sale was made of school land to file a certificate first and at the same time that canceled it, it never went out of the office.

Q. Will you just look at the entries under the column of remarks with reference to Sec. 16-30-17 east and tell me the dates of the earliest patents there.

A. March 7th and May 31st, 1864.

Q. And Sept. 5th, 1865.

A. Sept. 5th, 1865.

Q. Now I call your attention to an entry on page 350 of Ex. No. 71 with reference to the entire northeast quarter of Sec. 16-30-15 and ask you when that was patented by the State of Wisconsin.

A. This was patented Jan'y 27, 1879.

Q. Have you the certificates for the sale of those lands so you can tell me when the contract was made for the sale of those lands.

A. The contracts are dated Oct. 2nd, 1865.

Q. And the contract shows an agreement of purchase from the State under that date.

A. Under that date, yes that was the date of the purchase on contract, contract to sell rather by the State.

Complainant offered in evidence from Ex. No. 71, the entries on pages 349 and 350 of all the entries affecting these lands in Sec. 16-30-13, Sec. 16-30-14, Sec. 16-30-15 and Sec. 16-30-16 and ask you Mr. Martin instead of the original remaining in evidence a certified copy by the Chief Clerk of the State land office may be filed and used with the same force and effect as the original.

320 By Mr. Martin: Yes sir.

It was stipulated that the Chief Clerk of the Land Office may make a certified copy of the dates of the contracts on all the lands the descriptions of which have been offered and that those may be filed with the Commissioner and received as evidence in this action and includes all the sections 16 in the reservation.

Complainant offered in evidence Ex. No. 74 being the remaining abstract of the title under the same arrangement as the other abstracts.

By Mr. Martin: Subject to the same objection as the other abstracts.

Q. I show you book marked Ex. No. 75, and ask you what that is.

A. That is a volume in which are recorded the patents issued by the State for the various lands.

Q. Both Exs. 71 and 75 are official records of the State of Wisconsin.

A. Yes sir.

Q. Kept in its land department or land office.

A. Yes sir.

Q. And of which you as chief clerk of the land office are the legal custodian.

A. Yes sir.

Complainant offered in evidence from Ex. No. 75 the record of patent number 2736 in Vol. 7 of Sixteenth sections, patents covering 2436 to 2907 inclusive and which has been here identified as Ex. No. 75 and ask you Mr. Martin whether you will consent that a certified copy of that patent under the hand of the chief clerk of the land office may be received in evidence in lieu of the original with the same force and effect.

321 By Mr. Martin: Yes sir.

Q. Was this form of patent No. 2736 the one followed by the State in its grants of school sections.

A. Yes sir, I know of no other form, perhaps a little different shape but the wording was the same.

Q. Have you a letter received by this department from the Commissioner of Indian Affairs back in 1865 relative to the temporary occupancy by the Menominee Indians of certain lands.

A. Yes sir.

Q. In northern Wisconsin.

A. Yes sir.

Q. Have you produced a record which the Commissioner has identified as Ex. No. 76 and I ask you to tell me whether or not that is a letter which you produce from the files and records of the land office of the State of Wisconsin and which is in your custody as chief clerk of said land office.

A. Yes sir.

Q. That purports to be a letter dated Feb'y 8th, 1865 from J. N. Edmunds, Commissioner of the General Land Office of the United States, can you tell me whether or not that is the original letter received from the Commissioner as you understand.

A. As I understand, I know of no other.

By Mr. Thompson: We desire to offer this letter Ex. No. 76 in evidence and then to read the original into the record and would like *the* have you agree that that letter may be received with the same force and effect as the original and subject to the same objections that might be made to the original.

By Mr. Martin: The defendant does not object to the form in which this letter is offered in evidence but *but* objects to the introduction thereof in evidence for the reason that it is incompetent, irrelevant and immaterial, and for the further reason that it appears on the face of it that it does not refer to any land in the present Indian Reservation nor to any land situated in what is commonly called the school sections of the State, and for the further reason that it has no bearing whatever on any issue involved in this action.

Q. This letter Ex. No. 76 is directed to Hon. Winfield Smith, Madison, Wisconsin, at the time of the date of that letter what official position if any did Mr. Winfield Smith occupy.

A. He was Attorney General.

Q. Attorney General of the State of Wisconsin.

A. Yes sir.

Q. And this was an official letter and has so been kept and preserved.

A. Yes sir.

Ex. No. 76.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
February 8th, 1865.

Hon. Winfield Smith, Madison, Wisconsin.

SIR: Referring to your letter of the 31st ult. and to one letter of the 4th ult. relating to selections of swamp lands in Town 28 North of Range 17 east, Menasha Dist. Wisconsin, I have to state that a further examination into the *into the* action of this office heretofore made with reference to the township in question reveals the following facts concerning the same, viz: the lands in Town 28

323 Range 17 were surveyed and offered in 1846 they seem to have been clear of any interference by reservation or grant at the date of the passage of the swamp grant. In 1853 this township with others was temporarily set apart for the use of the Menominee Indians, not however by treaty stipulation, but by agreement between the general government and the Menominees with the assent of the State of Wisconsin. At the request of the Commissioner of Indian Affairs all lands embraced in this temporary reservation were withdrawn from public sale. In 1855 a new permanent reservation was by treaty ceded to the Menominees which did not include the township in question.

Shortly after the lands were restored to market and swamp selections in Wisconsin were made from field notes of the public surveys and reported to this office by the Surveyor General. It appears in this case that the lands in question were reported as swamp in 1854 at a time when they were not in market but were occupied by the Menominees as a temporary home. For this reason all action relative to these swamp lands was suspended and as the cause for suspension has since been removed I see no good reason for not also removing the suspension itself. The title to the lands never passed out of the United States by the permission given to the Menominees to occupy them, but was simply an arrangement made to meet certain exigences and lasted but two years. These lands having been restored to market prior to the Act of March 3rd, 1857, Vol. 11 page 251 and being at that date ordinary public lands will therefore come within the provisions of that act. I am in view of these facts of the opinion that the swamp selections in Town 28, North of Range 17 East, heretofore reported to this office, stands in the same relation as others elections from that state and have ordered that they

324 be taken up and dealt with in accordance with the laws and rulings pertaining to such.

Very respectfully your obedient servant,

J. M. EDMUNDS,
Commissioner.

That is endorsed, Commissioner of the General Land Office, Feb'y 8th, 1865. Swamp Lands, in T. 28 R. 17 East,

Q. Can you tell me Mr. Bennett, whether or not the State of Wisconsin has in the past claimed and still claims the lands in these sections 16 in the Menominee Reservation as belonging to it under the school land grant.

A. Always have *yo* my knowledge. I never heard of any relinquishment.

Q. It has claimed and does it still claim.

A. It still claims, from all the records I have known of or any knowledge of.

Cross-examination by Mr. Martin:

Q. Is Ex. No. 72 the form that was used in contracting for the sale of all school lands with reference to which you have testified.

A. Yes that was the form.

Q. And where the C appears in the book from which you have been testifying it refers to the same form of contract as set forth in Ex. No. 72.

A. Yes sir.

Q. In the book from which you have been testifying on page 252 opposite to land which it does not appear that the State has sold is written "Indian Reservation" and that is dittoed under each forty.

A. Yes.

Q. What is the significance of that writing in pencil.

325 A. I think that is intended to indicate that it is within the reservation. Sometimes we have other lands and we find the same memorandum.

Q. What is the purpose of stating that, on the Indian Reservation.

A. X Call attention to it, is all I know.

Q. Was there any particular reason why attention should be called to the fact it is on the Indian Reservation.

A. No sir.

Q. Is it not for the purpose of Informing would be purchasers that it is in fact in the Indian Reservation.

A. Yes, but that is not entered for that purpose that entry.

Q. Is there any entry for that purpose.

A. I don't know of any, that is entered for the information of the State land office.

Q. On page 307 opposite the descriptions of lands which appear not to have been contracted or sold by the state likewise in pencil the words, "Indian Reservation."

A. Yes sir.

Q. Also on page 307 in pencil appears the following notation opposite said land, "No selection of swamp lands having been made in this town." The notation "Indian Reservation" only appears opposite the descriptions of land in the present reservation, which does not appear to have been sold or contracted by the State, is not that true.

A. Yes sir.

Q. The C indicating contract appears in pencil.

A. Yes sir.

Q. Is that the only record in your office showing that a contract has been made for the sale of this land.

A. No sir.

326 Q. You have other records.

A. Yes sir.

Q. Are these lands still for sale by the State.

A. They are not for sale at the present time because none of the State lands are at present for sale. Not until they are offered and appraised.

Q. You say some of the lands on the Menominee Reservation have not been appraised.

A. They have been appraised but not offered for sale.

Q. Have you any record to show whether or not they have been offered for sale.

A. Yes if they had been offered the record would show.

Q. What record would show, this record here.

A. No that would be the sales book. Whenever any lands were offered for sale under the law they were entered in the sales book, if they were not offered they do not appear.

Q. You cannot say by reference to this book whether these particular lands which do not appear to have been sold were ever offered for sale or not.

A. I couldn't state positively from that book, that entry would indicate they have not been offered for sale.

Q. You did not make any of the entries about which you have been testifying.

A. No sir.

Redirect examination by Mr. Thompson:

Q. These pencil notations on pages 252 and 307 of Ex. No. 71, to which Mr. Martin has called your attention being the words on page 252, "Indian Reservation", dittoed, and on page 307 "Indian Reservation", and no selection of swamp lands have been made
327 in this town". Are written rather faintly in lead pencil.

A. Yes sir.

Q. Under the column of remarks on page 252 and under the column T and under the column remarks on page 307.

A. Yes sir.

Q. And those you say are faint pencil notations made for the information and use of the land office.

A. Yes sir, that is my understanding.

Q. And the same with the letter C, in other descriptions, they were faint pencil marks, to indicate contracts outstanding for the sale of those lands.

A. Yes sir.

By Mr. Martin: What benefit would it be the land office to show that those lands were within the Indian Reservation.

A. I can only say this, that intending purchasers if they were offered for sale the purchasers would understand that being within the Indian Reservation they would be in the same situation as those

other fellows, they wouldn't be entitled to occupancy they would understand that when they bought.

Q. And that is the purpose to indicate here the lands are all in the Indian Reservation.

A. The only purpose so far as I know.

By Mr. Thompson: No such written memorandum appears opposite the other descriptions which have been sold.

A. No.

Q. And the fact that the lands were in the Indian reservation might possibly affect their right to ingress and egress to the lands.

328 A. I don't know as to that, that seems to be a legal question.

Q. Don't you know that the State when it sent its cruisers up there some years ago to estimate the timber it got into a little trouble with the Government of the United States, before they could get permission to go on the Reservation at all.

Defendant objected as immaterial.

A. I don't know I have no personal knowledge of that.

By Mr. Martin:

Q. The words "Indian Reservation", might have been written opposite the land which has been sold and contracted by the State and that notation erased, might it not.

A. It might have been.

By Mr. Thompson:

Q. No indication of it.

A. No sir.

By Mr. Martin: It is written very faint and might have been reased and left no indication.

A. Yes, that is a matter of speculation.

By Mr. Thompson: As a matter of fact the descriptions of the land which the state has and offers for sale are usually printed and distributed through the state or in old times were printed and distributed through the State, were they not.

A. You mean printed in pamphlet form.

Q. Yes.

A. There has been such publications, there have been publication of that sort to my knowledge but that it was always done I couldn't say. I know the lands have not been sold until first offered
329 at public auction and we cannot sell any land until after having been first first advertised at public sale, that is the law.

Complainant offered in evidence Ex. No. 77, being a memorial of the House of Representatives and the Council of the Territory of Wisconsin to the Senate of the United States upon the subject of a treaty with the Menominee tribe of Indians signed by Timothy Burns, Speaker of the House of Representatives, Horatio M. Wells, President of the Council, and approved Feb'y 26th, 1848. Henry Dodge, which said Memorial Reads as follows:

Memorial of the Council and House of Representatives of the Territory of Wisconsin.

To the Senate of the United States, upon the subject of a treaty with the Menominee tribe of Indians for the lands north of the Fox River;

The Memorial, of the Council and House of Representatives of the territory of Wisconsin to the Senate of the United States respectfully sheweth:

That a large and interesting portion of our territory lying north of the Fox and between the Wolf and Wisconsin Rivers, in close proximity to densely settled counties, is still held and occupied by the Menominee tribe of Indians and various considerations of interest to this territory imperiously demand the earliest possible extinguishment of the Indian title to those lands. On the 8th day of August, 1846, Congress passed an act appropriating to the State of Wisconsin a certain quantity of land equal to one-half of three sections in width on each side of the Fox river and the lakes through which it passes, for the purpose of improving the Fox and Wisconsin

Rivers, and constructing a canal to connect the same, which
 330 lands are to be selected by the Governor of the State of Wisconsin of Wisconsin previous to the passage of this act much of the valuable land then in market upon the said river and lakes, had already been purchased and passed from the possession of the Government, consequently the selection of the necessary quantity of land to complete said work, the location of which will be required immediately upon the organization of our State Government the ensuing season, cannot be made in good lands from that part of the Reservation now in market. Hence will be seen the imperious necessity of the early extinguishment of this Indian title in order that the State may avail itself of the benefits of this important grant of congress. But this interest is not the only important interest to the State of Wisconsin that would be injuriously affected by the delay of the extinguishment of the Indian title to those lands. At the present rate of purchase and location by military land warrants another year will nearly complete the sales of the desirable portions of agricultural lands lying south of the Fox River Reservation, consequently these lands will be wanted for immediate settlement. You- memorialists are also informed and believe that this tract of country in addition to large quantities of valuable agricultural, embraces some of the best pine lands to be found in Wisconsin and directly connected with a large and extensive agricultural district on the south totally destitute of this valuable kind of timber. Hence another important consideration for the speedy sale of the lands alluded to.

In presenting these considerations for an early treaty with the Menominees for this valuable land, your memorialists are aware that however desirable would be the accomplishment of this important object, they are constrained to believe that under the restric-

tions imposed by the following clause of the resolution of the
 331 Honorable Senate adopted on the 3rd day of March, A. D.
 1842, viz:

"That in future negotiations of Indian treaties no reservation of land should be made in favor of any person nor the payment of any debts provided for" it will be in vain to attempt to treat with this tribe of Indians. Your memorialists are satisfied and believe that these Indians are honestly and honorably indebted to certain Indian traders, who are allied to them by intermarriage, and who have resided long on their borders, and who in seasons of want and distress, by sickness and by famine, have contributed liberally to their necessities by supplies and provisions and goods, and that no consideration can be offered to induce these Indians to treat for their lands except upon condition of payment by money or grant of land to the creditors and friends who have thus aided them in distress. Indeed with the fullest conviction that proper credits have been given them, your memorialists believe that any attempt to urge them to make sale of their lands without a provision for such payment would be urging them to dishonor and violate a legal and moral obligation as binding as any in civilized life.

In view of all these premises you memorialists most respectfully ask your honorable body a reconsideration of the restrictions imposed by the resolution alluded to, that the appropriation since made by Congress for defraying the expenses of a treaty with that tribe of Indians may be made available, and all the benefits depending upon an early survey of those valuable lands be realized to the people of Wisconsin, and as in duty bound will ever pray.

TIMOTHY BURNS,

Speaker of the House of Representatives.

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HORATIO N. WELLS,

President of the Council.

Approved Feb'y 26th, 1848.

HENRY DODGE.

Defendant offered in evidence Dafts Exs. 4, 5, and 6 being biennial reports of the Commissioner of Public Lands.

Complainant objected as incompetent, irrelevant and immaterial but makes no objection to their offer at this time.

Complainant offered in evidence Ex. No. 78, being an official map of the State of Wisconsin published by the Railroad Commission of Wisconsin as showing the present conditions.

Complainant offered in evidence certified copy of a letter of August 27th, 1849, to William H. Bruce from the office of Indian Affairs signed O. B. Ex. No. 79.

Also certified copy of a letter dated Aug. 27, 1849, to W. H. Bruce, Green Bay, Wis., signed O. B. Ex. 80.

Also letter of Aug. 28th, 1849, from the office of Indian Affairs to William Butler, Esq., signed O. B. Ex. No. 81.

Also letter of Aug. 28th, 1849, to Hon. Geo. W. Crawford, Secretary of War, signed O. B. from the Office of Indian Affairs, and marked on the back of the first sheet Ex. No. 81 and on the back of the second sheet Ex. No. 82.

Also letter dated Sept. 24th, 1849, to the Hon. Orlando Brown, Commissioner of Indian Affairs, from W. H. Bruce, marked on the back of the second sheet, Ex. No. 85.

Also a letter of Oct. 9th, 1849, to Orlando Brown, Commissioner of Indian Affairs from William H. Bruce, Ex. No. 86.

333 Also letter of Nov. 9th, 1849, from O. B. to William H. Bruce, Ex. No. 87.

Also letter of Nov. 9th, 1849, from O. B. to Brig. Genl. Thomas Lawson, Ex. No. 88.

Also letter of Jan'y 22, 1850, to Hon. J. D. Doty, from O. B. Marked on the back of the second sheet, Ex. No. 89.

Also letter of Jan'y 22nd, 1850, to the Hon. J. D. Doty from O. B. Ex. No. 90.

Also letter of May 13th, 1850, to Col. W. H. Bruce, from O. B. Marked on the back of the third sheet, Ex. No. 92.

Also letter of May 10th, 1850, to Capt. Eastman from O. B. Ex. No. 93.

Also letter of May 10th, 1850, to Lykins from O. B. Ex. No. 94.

Also letter of July 27th, 1850, from W. H. Bruce to Hon. Luke Lea Commissioner of Indian Affairs, and marked on the back of the third sheet Ex. No. 95.

Also letter of Sept. 7th, 1850, from the Acting Commissioner of Indian Affairs, Ex. No. 96.

Also letter of Sept. 5th, 1850, signed Millars Filmore to the Secretary of the Interior, Ex. No. 97.

Also letter of Sept. 2nd, 1850, to O. F. Winship, marked on the back of the second sheet, Ex. No. 98.

Also a letter to the Hon. L. Lea, Commissioner of Indian Affairs, from Elias Murray, Superintendent of Indian Affairs, dated Sept. 30th, 1851, P. Ex. No. 99.

Also letter of L. Lea, Commissioner, to Hon. Alex. H. H. Stuart, dated June 1st, 1852, Ex. No. 100, also the endorsement thereon of the President's order of June 2nd, 1852. Also Ex. No. 101, being an endorsement of the same.

Also letter from Secretary Stewart of June 2nd, 1852, to the President. Ex. No. 102.

334 Also letter of E. Murray to L. Lea, Commissioner of Indian Affairs, dated June 13th, 1852, Ex. No. 103.

Also letter of Nov. 3rd, 1852, of certain Indians marked on the back of the second sheet Ex. 104.

Also communication or letter to Hon. E. Murray, Supt. of Indian Affairs, dated Dec. 6th, 1852, from the Indians marked on the back of the fourth page, Ex. No. 105.

Also Tullars survey, Ex. No. 106.

Also letter of Eastman of March 8th, 1854, to the Commissioner of Indian Affairs, Ex. No. 107.

Also letter or statement of Tullar to the Chief Clerk of the Menominee nation and endorsements beneath the same, Ex. No. 108.

Also letter from Tullar of Feby. 7th, 1854, to Hon. M. L. Martin, Green Bay, Wis., marked on the back of the second sheet, Ex. No. 109. Also endorsements on the same marked Ex. No. 110.

All of the above letters being certified copies of the originals on file in the office of the Department of the Interior and the certificates being offered in connection therewith, Ex. No. 111.

Defendant objected to all said exhibits as incompetent, irrelevant and immaterial.

It was stipulated that the complainant may offer in evidence any records at the Keshena Agency which it may desire after Mr. Eberlein and Mr. Nicholson have gone over the same at any time before the 1st day of May, 1916, and such offer of testimony may be made by filing the same with the Commissioner with a written statement that the same are offered in evidence, and by sending a copy of such statement and all the exhibits offered to the attorney for the defendant.

And it is further agreed that copies of such records may
335 be so offered and may be received in evidence if certified by the Supt. of the Menominee tribe, Mr. Nicholson, that the same are true copies, and that the same may be offered subject to defendants objection as incompetent, irrelevant and immaterial.

Complainant rested with the exception of the taking of testimony under the above stipulation and certified copies from the land office.

336 Certified protographis copy of pages 252-253 and 306-307 and 349-350 of Ex. No. 71, marked Complainants Ex. No. 112.

Certified copy of Ex. No. 72 being the agreement or contract for the purchase of the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ and lot one on Sec. 16-28-14 marked Complainants Ex. No. 114.

Certified copy of Patent No. 2736 to Fannie B. Hunter (Ex. No. 73) marked Complainants Ex. No. 114.

Certified copy of the dates of sale and number of certificates of all lands in

Sec. 16-28-13	Sec. 16-29-13	Sec. 16-30-13
Sec. 16-28-14	Sec. 16-29-14	Sec. 16-30-14
Sec. 16-28-15	Sec. 16-29-15	Sec. 16-30-15
		Sec. 16-30-16

Marked Complainants Ex. No. 115.

Subsequently the complainant by its counsel, John C. Thompson and R. A. Hollister, appeared before the Commissioner and offered in evidence the following exhibits pursuant to stipulation.

(Pages 163 to 187 inclusive.)

337

In the Supreme Court of the U. S.

THE STATE OF WISCONSIN, Complainant,

vs.

FRANKLIN K. LANE, Secretary of the Interior, Defendant.

Take notice that pursuant to the stipulation entered into by the parties to the above-entitled action at the taking of testimony by and in behalf of the Complainant before the Honorable William C. Kimball, Commissioner, which stipulation appears in the record of said hearing the Complainant now offers in evidence certain records at the Keshena Agency which have been gone over by Mr. Eberlein and Mr. Nicholson, and which offer as by such stipulation provided is now made by filing with the Commissioner this written statement, and by now filing with said Commissioner and offering in evidence, pursuant to said stipulation, copies of such of the said records as the Complainant desires to offer in evidence, which said copies are certified to as being true copies by said Nicholson, Superintendent of the Keshena Agency, and of the Menominee tribe, by his assistant Superintendent, H. P. Marble, the same to be received in evidence subject to the Defendant's objections that the same are incompetent, irrelevant and immaterial, viz:

Complainant offers in evidence certified copy of letter of July 7th, 1898, to the Hon. Com. of Indian Affairs from the Logging Superintendent, and asks that the same be identified as Complainant's Exhibit No. 116.

338 Complainant offers in evidence certified copy of letter of February 28, 1900, to Mr. D. H. George, U. S. Indian Agent from W. A. Jones, Commissioner, and asks that the same be identified as Complainant's Exhibit No. 117.

Complainant offers in evidence certified copy of letter of November 15th, 1898, to Mr. D. H. George, U. S. Indian Agent, from W. A. Jones, Commissioner, and asks that the same be identified as Complainant's Exhibit No. 118.

Complainant offers in evidence certified copy of letter of March 4th, 1899, to Mr. D. H. George, U. S. Indian Agent, from A. C. Tonner, Agt., Commissioner, and asks that the same be identified as Complainant's Exhibit No. 119.

Complainant offers in evidence certified copy of letter of November 1, 1898, to Mr. D. H. George, U. S. Indian Agent, from A. C. Tonner, Asst. Commissioner, and asks that the same be identified as Complainant's Exhibit No. 120.

Complainant offers in evidence certified copy of letter of October 6, 1897, to Thomas H. Savage, Esq., U. S. Indian Agent, from A. C. Tonner, Acting Commissioner, and asks that the same be identified as Complainant's Exhibit No. 121.

Complainant offers in evidence certified copy of letter of October 6, 1897, to C. K. Matteson, Esq., from A. C. Tonner, Acting Com-

missioner, and asks that the same be identified as Complainant's Exhibit No. 122.

Complainant offers in evidence certified copy of a- Appraiser's Report dated July 6th, 1898, and asks that the same be identified as Complainant's Exhibit No. 123.

Complainant offers in evidence certified copy of letter of July 7th, 1898, to Hon. Com. of Indian Affairs, from D. H. George, U. S. Indian Agent, and asks that the same be identified as Complainant's Exhibit No. 124.

Complainant offers in evidence certified copy of letter of November 6th, 1897, to Hon. Com. of Indian Affairs from D. H. George, U. S. Indian Agent, and asks that the same be identified as Complainant's Exhibit No. 125.

Complainant offers in evidence certified copy of letter of April 7th, 1898, to Hon. Com. of Indian Affairs from D. H. George, U. S. Indian Agent, and asks that the same be identified as Complainant's Exhibit No. 126.

Complainant offers in evidence certified copy of Estimate of Pine Timber cut from the lands claimed by the State of Wisconsin on the Menominee Indian Reservation and asks that the same be identified as Complainant's Exhibit No. 127.

Complainant offers in evidence certified copy of data on sixteenth sections from report of Thos. H. Savage, U. S. Indian Agent, to the Commr. of Indian Affairs, as found on page 305 of the Annual Report of the Commissioner for 1897, and asks that the same be identified as Complainant's Exhibit No. 128.

Complainant offers in evidence certified copy of letter of November 28th, 1899, to H. G. Borgman from D. H. George, U. S. Indian Agent, and asks that the same be identified as Complainant's Exhibit No. 129.

A copy of this statement and of the exhibits all here offered has been sent to the attorneys for the defendant, and a copy of the letter to said attorneys for the defendant, enclosing the same is hereto attached.

Dated April 29th, 1916.

Yours, etc.,

WALTER C. OWEN,
Attorney General for the State of Wisconsin.
M. G. EBERLEIN,
J. C. THOMPSON,
R. A. HOLLISTER,
Solicitors for the Complainant.

340

P. Ex. 116.

Copy.

GREEN BAY,
KESHENA, WISCONSIN.
July 7th, 1898.

Hon. Com. of Indian Affairs, Washington, D. C.

SIR: I have the honor to state that I have read the letter of D. H. George, U. S. Indian Agent, Green Bay Agency, Wisconsin, relative to the claims of the authorities of the State of Wisconsin for pine timber cut on lands claimed by the State on the Menominee Indian reservation, and I agree with him in his conclusions.

Very respectfully,

(Name not copied.)
Logging Superintendent.

Certified a true copy from page 27 official letter book July 1, 1898, to June 30, 1899, records of Keshena Agency.

H. P. MARBLE.
*Assistant Superintendent Keshena
Indian School, Keshena, Wis.*

341

P. Ex. No. 117.

Refer in reply to following accounts.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, Feb. 28, 1900.

Mr. D. H. George, U. S. Indian Agent, Green Bay, Wisconsin.

SIR: Under date of November 20, 1899, you transmitted to this office an agreement pertaining to the cutting of timber on certain portions of Section 16, tp. 30, N. R. 16 E. the same being one of the school sections on the Menominee Indian Reservation. The said agreement was made by the chiefs and headmen of the Menominee Indians in Council assembled, on November 18, 1899. The fee title of the land referred to is claimed by Hollister Amos and Company, of Oshkosh, Wisconsin, the same having been conveyed by patent from the State of Wisconsin. The said agreement authorizes the Commissioner of Indian affairs to enter into an agreement with the owner of the fee to said land for the removal of a considerable quantity of timber, estimated at twelve hundred thousand feet, provided that the price to be paid for the cutting, hauling and banking of said timber shall not be less than \$5.50 per M. feet, that the said logs shall be banked on South Branch of Oconto River, that all of the labor of cutting, hauling and banking the said

timber shall be done by contract with the Menominee Indians, under the rules and regulations now in force on their reservation, and that on delivery of the logs and timber to owners of the fee, they shall convey to the United States, for the benefit of the Menominee Indians, all of their right, title and interest in and to the said lands.

Under the date of February 14, 1900 the Department approved the agreement with Hollister Amos and Company (See official telegram of February 14, 1900, relating thereto). Under date of February 26, 1900, the Department approved the contract theretofore entered into between Hollister Amos and Company and the Commissioner of Indian Affairs, (George 2) and accepted the bond for fifteen thousand (\$15,000) dollars filed by Hollister Amos and Company for the faithful performance of said contract.

You are directed to enforce the terms of the contract in every particular, and no deviation from the terms of the said contract will be permitted under any circumstances.

You will apply to this contract the existing rules for the cutting of timber on the Menominee Reservation, in so far as they may be applicable, and if any additional rules are necessary to meet the proper requirements of the service of the contract, you will submit such rules as you may deem proper to this Office for approval.

You are directed to use distinctive side and end log marks on the logs to be cut under this contract, in order that they may be easily identified from the logs cut under the regular logging operations, and you will notify this Office what such log marks will be.

The scaling of the logs and timber cut from the land described in the contract shall be made by the same scalers that scale the government logs. This work is to be performed in addition to the regular duties assigned to them, and shall be under the supervision of the Superintendent and assistant superintendent of logging now employed at your agency. The Supt. and Asst. Supt. of logging will not receive any additional compensation for their work in connection with this matter, but you will require them to perform such work under this contract as may be necessary in connection with their other duties.

You are also directed, in accordance with paragraph 3 of the contract, to require Hollister Amos and Co., to advance such reasonable sums of money in payment for the cutting hauling and banking of the logs and timber from the land described therein, as may be necessary at such times as in your judgment (George 3) the needs of the service require.

You will follow the same system of accounting for the moneys received and disbursed under this contract as in the case of the regular logging operations, and under no circumstances, either directly or indirectly, will you merge this accounting with that of the regular logging operations.

Inasmuch as it is the desire of this Office that you shall fully represent the Commissioner of Indian Affairs under the terms of this contract, you will require the part of the first part to deliver to you for transmission to this Office a good and sufficient deed of their right

title and interest in and to the land described in said contract and any balance of money that may be due from them under the terms of the said contract, at the time of the delivery by you of the logs to the said party of the first part.

If at any time you desire to take any action in this matter other than that directed in this communication or under the terms of the contract, you will fully advise this Office and wait for authority before taking such action.

Very respectfully,
(Signed)

W. A. JONES, *Commissioner*.

344 (L.)

A. C. T.

WASH., 4/25/16.

Certified a true copy from records of Keshena Indian Agency
Keshena, Wisconsin.

H. P. MARBLE,
*Assistant Superintendent Keshena
Indian School, Keshena, Wis.*

345

P. Ex. 118.

Refer in reply to the following:

"A."

44412-49755.

46984-49911-98.

Auth. 58876.

1 Incl.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, Nov. 15, 1898.

Mr. D. H. George, U. S. Indian Agent, Green Bay Agency, Wisconsin.

SIR: Under date of September 26, you transmitted to this office and agreement pertaining to the cutting of timber of certain portions of Section 16, Tp. 30, N. R. 16 E. the same being one of the school sections of the Menominee Reservation. The said agreement was made by the chiefs and head men of the Menominee Indians, in Council assembled, September 19, 1898. The fee title of the land referred to is claimed by the Oconto Company of Oconto, Wisconsin, having been purchased by them from the State of Wisconsin. The said agreement authorizes the Honorable the Commissioner of Indian Affairs to enter into an agreement with the owner of the fee to said lands for the removal of a considerable quantity of pine timber, estimated at five million feet, provided that the price to be paid for the cutting, hauling and banking of the said pine timber shall not be less than \$4.25 per M-feet, that the said logs shall be banked on the south Branch of the Oconto River, that all of the labor of cutting, haul-

ing and banking the said timber shall be done by contract
346 with the Menominee Indians, under the rules and regulations
now in force on their reservation, and that on the delivery of
the pine logs and pine timber to the owners of the fee, they shall
convey to the United States, for the benefit of the Menominee Indians
all of their right, title and interest in and to the said lands. (George
2) Under date of November 3, the Department accepted the propo-
sition of the Oconto Company, provided a satisfactory bond be filed
by them for the faithful performance of the terms of the Contract.
Under the date of November 5, a contract was entered into between
the Oconto Company and the Commissioner of Indian Affairs (copy
inclosed herewith) and on the same date the said Oconto Company
filed a bond in the sum of \$30,000 for the faithful performance of
the said contract. Under date of November 8, the Department ap-
proved the said contract and bond and *also* granted authority for the
application to this contract of the existing rules for the cutting of
timber on the Menominee Reservation, as provided in the contract,
and to add such rules to those already existing as may be necessary
to meet the proper requirements of the contract and of the service.

You are therefore hereby directed to notify the Oconto Company
of the earliest date when you will be prepared to commence opera-
tions under the said contract.

You are also directed to enforce the terms of the contract in every
particular, and no deviation from the terms of the contract will be
permitted in any circumstances. You will apply to this contract the
existing rules for the cutting of timber on the Menominee Reserva-
tion, in so far as they may be applicable and if any additional rules
are necessary to meet the proper requirements of the service or of the
contract, you will submit such rules as you may deem proper

347 to this office for approval.

You are also directed to have the 16th section referred to
subdivided by a competent wood-man and surveyor, under your direc-
tion and that of the Superintendent of Logging and to require the
Oconto Company to bear the expense of such survey.

You are directed to use distinctive side and end log marks on the
logs to be cut under this contract, in order to avoid any possibility
of their becoming (George 3) mixed with the logs cut under the
regular operations, and will notify this Office what such log mark
will be.

The scaling of the logs and timber cut from the lands described
shall be made by the scalers to be selected by you and to be paid by
the Oconto Company, and to be under the direction of the superin-
tendant and assistant superintendent of logging now employed at
your agency. The superintendent and assistant superintendent of
logging will not receive any additional compensation for their work
in connection with this matter, but you will require them to perform
such work under this contract as may be necessary in connection with
their other duties.

You are also directed, in accordance with the terms of the con-
tract to require each party of the first part to advance such reason-
able sums of money in payment for the cutting, hauling and bank-

ing of the logs and timber on the lands described as may be necessary, at such times as in your judgment the needs of the service require.

You will follow the same system of accounting for moneys received and disbursed under this contract as in the case of regular logging operations, and under no circumstances, either directly or indirectly, will you merge this accounting with what of the regular logging operations.

348 Inasmuch as it is the desire of this office that you shall fully represent the Commissioner of Indian Affairs under the terms of this contract you will require the party of the first part to deliver to you, for transmission to this Office a good and sufficient deed of all of their right, title and interest in and to said described lands, and any balance of money that may be due from them under the terms of the said contract, at the time of the delivery by you of the terms to the said party of the first part.

If at any time you desire to take any action in this matter other than that directed in this communication or under the terms of the contract, you will (George 4) fully advise this office and wait for authority before taking such action.

Very respectfully,
(Signed)

W. A. JONES,
Commissioner.
W. A. S. L.

(L.)

4/2/16.

Certified a true copy from the records of Keshena Agency, Keshena, Wis.

H. P. MARBLE,
Assistant Superintendent, Keshena Indian School,
Keshena, Wis.

349

P. Ex. No. 119.

Refer in reply to the following:

44412-98, 49755-98,

46984-98, 49911-98,

9989-98 Auths.

58876 & 59456,

i incl.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, March 4, 1899.

Mr. D. H. George, U. S. Indian Agent, Green Bay, Wisconsin.

SIR: Under date of November 15th, 1898, you were instructed relative to the cutting of timber on certain portions of Sec. 16 T. 30. N. R. 16 E. the same being one of the school sections on the Menominee Reservation, the fee title to the land being with the Oconto Com-

pany, Wisconsin, having been purchased by them from the State of Wisconsin.

Under the date of December 21, the Department accepted the supplemental proposition of the Oconto Company for the cutting of 400,000 feet of timber (estimated) on the N. W. N. W. of Section 16, T. 30, N. R. 16 E. the fee to these lands being also with the Oconto Company, having been purchased from the State of Wisconsin.

Under date of March 4, 1899, a contract was entered into between the Oconto Company and the Commissioner of Indian Affairs (copy inclosed herewith).

350 The department also granted authority for the application to this supplemental contract of the existing rules for the cutting of timber on the Menominee Reservation, as provided in the original contract.

You are therefore hereby directed to notify the Oconto Company of the earliest date when you will be prepared to commence operations under the said supplemental contract.

You are also directed to enforce the terms of the contract with respect to the supplemental contract in every particular and apply to the supplemental contract all the rules regulations and instructions embodied in Office letter of Nov. 15, 1898.

You are also directed as soon as the cutting of the above described timber shall commence, to make a report to this Office at the close of each week of the amount of logs cut.

Very respectfully,
(Signed)

A. C. TONNER,
Act'g Commissioner.
W. A. S. L.

(L.)

4/25/16.

Certified a true copy from records of Keshena Indian Agency, Keshena, Wisconsin.

H. P. MARBLE,
Assistant Superintendent, Keshena Indian School,
Keshena, Wisconsin.

350

P. Ex. No. 120.

"A."

20842, 21502,

30648, and

30944—1898.

Auth 57491 and 58729.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, November 1, 1898.

Mr. D. H. George, U. S. Indian Agent, Green Bay, Agency, Wisconsin.

SIR: In compliance with the recommendation of this office under date of the 29th *ultimo*, the Department, under date of the 31st *ultimo*, modified the authority of July 25, last, relative to the payment of the claim of the State of Wisconsin for damages by reason of the cutting and removal of certain pine timber and logs from lands owned by the State of Wisconsin within the Menominee Indian Reservation by granting authority for Perley Lowe and Company of Chicago, Illinois, lumber contractors to pay to the State of Wisconsin the sum of \$9,548.10, being at the rate of \$13.60 per M. feet for 1,044,500 feet of pine timber and logs cut from lands on the reservation belonging to the State of Wisconsin, less \$4,667.10 for cutting and banking the same, the said sum to be paid out of the \$25,000 withheld by Perley, Lowe and Co., at the time of the settlement with the government, the payment of which, upon final adjustment was secured by bond furnished by Seymour W. Hollister.

352 As a condition of this authority it is understood that payment shall be made by Perley, Lowe and Co. to the properly authorized officer of the State, and that the said State shall, through said officer or proper officers, give a good and valid receipt to Perley, Lowe and Co., for the amount so paid, and the relinquishment of the replevin suit filed against them in the Circuit Court of Oconto County, Wisconsin, and that Perley, Lowe and Co., shall upon the completion of the aforesaid transaction at once deposit to the credit of the United States the sum of \$15,451.90, the balance of the \$25,000 at the same time transmitting to the Agent in charge of the Green Bay Agency, Wisconsin, the receipt and relinquishment proceedings received from the State.

You are therefore hereby directed to at once notify Perley, Lowe and Company of Chicago, Illinois, of the modification of the authority of July 25, 1898, and to require them, at the earliest practicable date, to deposit to the credit of the United States, in the usual manner the sum of \$15,451.90 being the balance of the \$25,000 due under their contract for the purchase of logs on the Menominee Indian Reservation, the certificate of deposit to be forwarded to this office.

Upon the receipt of positive information of the deposit to the credit of the United States of the above named sum, and the receipt by you of the receipt and the relinquishment proceedings received from the State of Wisconsin by Perley Lowe and Company, you are hereby authorized to return the bond of indemnity executed by Seymour W. Hollister and Philetus Sawyer to the United States of America to Perley, Lowe and Co., of Chicago, Illinois, taking their receipt therefor and forwarding such receipt to this office.

The authority contained in Office letter of July 27, concerning this matter, is hereby revoked.

Very respectfully,

A. C. TONNER,
Ass't Commissioner.

4/25/16.

Certified a true copy from records of Keshena Agency, Keshena, Wis.

H. P. MARBLE,
*Assistant Superintendent, Keshena Indian School,
Keshena, Wis.*

354

P. Ex. No. 121.

Land 40503—1897.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, October 6, 1897.

Thomas H. Savage, Esq., U. S. Indian Agent, Green Bay Agency, Keshena, Wisconsin.

SIR: I transmit herewith press copy of letter of even date to Mr. C. K. Matteson, Wittenburg, Wisconsin, denying his right to cut and remove timber on a section sixteen within the Menominee Reservation.

Very respectfully,

A. C. TONNER,
Acting Commissioner.

Murchison (H.)

4/25/16

Certified a true copy of letter in records of Keshena Indian Agency, Keshena, Wisconsin.

H. P. MARBLE,
*Assistant Superintendent
Keshena Indian School,
Keshena, Wis.*

355

P. Ex. No. 122.

Land 40503—1897.

DEPARTMENT OF THE INTERIOR,

OFFICE OF INDIAN AFFAIRS,

WASHINGTON, October 6, 1897.

C. K. Matteson, Esq., Wittenberg, Wisconsin.

SIR: I am in receipt of your letter of September 27th, 1897, in which you state that you have a contract for the cutting and hauling of the pine timber on Section 16, Township 30, Range 13, Shawano County, Wisconsin, which is within the Menominee Indian Reservation, that you have been notified by the Indian agent that you will not be permitted to use a certain road between Sections 17, 18, 19 and 20 within the township mentioned, in order to haul the timber from the said Section 16 and you wish to know it if you can obtain permission from this office to use the road, and if you can what steps you must take to obtain the permit.

In reply I have to say that in *Beecher vs. Wetherby* (95 U. S. 517) the Supreme Court of the United States held that the rights of the Menominee Indians in the lands embraced within their reservation were only that of occupancy; that "the fee was in the United States, subject to that right and could be transferred by them whenever they chose"; that the grantee however, would take only the naked fee and could not disturb the occupancy of the Indians which could only be interfered with or determined by the United States. It also held that it was an unalterable condition of the admission of Wisconsin as a State of the Union "obligatory" upon the United States, 356 that section sixteen in every township of the public lands in the State had not been sold or otherwise disposed of should be granted to the State for the use of schools. It matters not whether the words of the compact be considered as merely promissory on the part of the United States and constituting only a pledge of a grant in future, or as operating to transfer the title to the State upon her acceptance of the proposition as soon as the sections could be afterwards identified by the public surveys".

While, therefore, the ultimate fee to all the rest of the Menominee Reservation is in the United States as in other cases, the fee to section 16 of each township in that reservation is in the State of Wisconsin subject to the right of the Indians to occupy the same, and the State has the power to dispose of this fee and to patent the lands to her grantees. The grantees, however, would take only such rights as the State had, viz: the naked fee, the occupancy being in the Indians, which occupancy can only be disturbed or determined by this Government.

It is presumed that you claim this section 16, or a part of it, under a grant from the State of Wisconsin, although you make no statement to that effect.

By letter of November 11, 1890, to this office, the Secretary of the

Interior decided that one Henry Sherry who claimed title from the State to another section 16 of the Menominee Reservation had no right to enter upon the reservation and cut the timber therefrom. (See 12 L. D. 176). In this case Mr. Sherry had made application for a right of way across the reservation to and from said section 16 for the purpose of marketing the timber thereon.

In passing on his application the Department quoted from an opinion of November 10, 1890, upon the subject, by the Assistant Attorney General for the Interior Department, in which he said:

“Under the rulings in *Beecher vs. Wetherby*, it would seem to be clear that the fee simple to the school sections, within the present Menominee Reservation had passed from the United States to the State of Wisconsin, yet, being subject to the Indian right of occupancy a right which has, in this instance existed continuously from the discovery of the country to the present day and a right yet exists in my opinion neither the State nor its assignee can in manner interfere with the full enjoyment of that right. For the State's Officers or its assignee to cut timber upon said sections during the right of occupancy of the same by the Indians would unquestionably be a curtailment of the full enjoyment of that right which the Supreme Court has said is “unlimited” and consequently is a violation of law. *United States vs. Crook*, *supra* (p. 593). The cutting of timber upon said sections being illegal, in my opinion, it follows that the State's officers or its assignee can have no right to pass through the reservation for the purpose of committing said illegal act.”

In view of this opinion it would seem that you cannot be lawfully permitted to enter upon the Menominee Reservation to cut the timber of the lands described in your request, even though you should employ individual members of the Menominee tribe to do the logging for you, because the individual members of the tribe would not be competent to waive or consent to a modification of the right of occupancy which belongs to the whole tribe. I am of the opinion therefore that before the timber can be lawfully removed from this section of land the Indians by agreement entered into under and in accordance with the constitution and laws of the United States, must consent to a modification of their right of occupancy to the extent necessary. Only the United States can interfere with the Indian right of occupancy and this interference must be through negotiations authorized by Congress to be had with the Indians for that purpose.

Very respectfully,

A. C. TONNER,
Acting Commissioner.

Murchison (H.)

4/25/16

Certified a true copy of letter in records of Keshena Indian Agency, Keshena, Wis.

H. P. MARBLE,
Assistant Superintendent
Keshena Indian School,
Keshena, Wis.

359

P. Ex. No. 123.

Copy.

GREEN BAY,
KESHENA, WIS.,
July 6th, (1898).

In the matter of the claim of the State of Wisconsin against the United States and Seymour W. Hollister for damages by reason of the cutting and removal of pine timber owned by the State of Wisconsin, as shown by swamp land Patent No. 8, date (indistinct) 1865.

* * * * *

We the undersigned (not distinct) the parties in interest. Certify that careful examination had been made of the lands hereinafter described and we find that there has been cut and removed during the logging season of 1897-98 one million and forty four thousand, five hundred feet board measure of pine timber and logs. That said timber and logs were banked on the south Branch of the Oconto River in Township 30 N. of Range 16 East. That the records in the office of the Indian Agent for the Menominee Indians show: That said timber and logs were on March 15th, 1898 sold to Perley Lowe, and Company of Chicago, at a price and for a consideration of thirteen dollars and sixty cents \$13.60/100 per thousand feet;

That said timber and logs were hereafter sold and transferred by Perley Lowe and Company to Seymour W. Hollister of Oshkosh, Wis., and said sale and transfer was thereafter confirmed by the Hon. Secretary of the Interior.

The following is the description of the lands from which said timber and logs as cut and removed and the amount of same viz:

360

N. W. 4 N. E. 4 Sec. 1 Tp. 30 N. R. 16 E...	}	883 trees, 598,000 ft.
S. W. 4 N. E. 4 ditto.....		
S. E. 4 N. E. 4 "		

N. E. 4 N. W. 4 Sec. 9 ditto	}	119 trees 170,000 ft.
N. W. 4 N. W. 4 ditto		
S. W. 4 N. W. 4 "		
S. E. 4 N. W. 4 "		

N. E. 4 S. E. 4 Sec. 29 ditto	}	9 trees, 6,500 ft.
S. E. 4 N. E. 4 ditto		

N. E. 4 S. W. 4 Sec. 32 ditto.....	}	176 trees, 170,000 ft.
N. W. 4 S. W. 4 ditto.....		
S. E. 4 S. W. 4 "		

Total 1,187 trees 1,044,500 ft.

The amount of timber and logs as stated above is all of the timber and logs claimed by the State of Wisconsin as having been cut and removed during the logging season of 1897-98. (See authority 53,364 of Aug. 13, 1897) from lands owned by the State as shown by patent No. 8, dated March 15th, 1865, and sold by the United States to Lerley Lowe and Co., by them sold and transferred to Seymour W. Hollister.

E. G. MULLEN (?),
Chief Inspector of Lands.
 H. H. SCHWARTZ,
Spl. Agt. for United States Int. Dept.
 JAMES HOUSTON,
Scaler and Examiner for the United States.
 D. H. GEORGE,
U. S. Indian Agent, Green Bay Agency.
 P. E. DOYLE,
Logging Superintendent.
 S. W. HOLLISTER.

Certified a true copy from 19-22 official letter book July 1, 1898 to June 30, 1899, records of Keshena Agency.

H. P. MARBLE,
*Assistant Supertendant, Keshena
 Indian School, Keshena, Wis.*

362

P. Ex. No. 124.

Copy.

GREEN BAY,
 KESHENA, WISCONSIN.
 July 7th, (1898).

Hon. Com. of Indian Affairs, Washington, D. C.

SIR: I have the honor to state that in accordance with instructions contained in your letter dated June 25th, ult. Harry H. Sewartz, Special Agent of the General Land Office, James Houston, Scaler, P. E. Doyle, Logging Superintendent at this agency and myself on the part of the department E. G. Mullen, Chief Inspector of Lands, for the State of Wisconsin, and S. W. Hollister, on the part of Perley Lowe and Co., and himself, mailed you a report in duplicate of the amount of timber cut on lands claimed by the State of Wisconsin located within the boundaries of the Menominee Indian Reservation during the winter of 1897-98. The report covers the timber cut from all lands claimed by the authorities of the State of Wisconsin under patent number 8 dated November 13th, 1865, located near the south branch of the Oconto River. The report covers more land than was described in the letter of instructions, but I wanted to make a clean job of it and had all the lands claimed by the State examined. The report shows that 1,187 trees were cut, scaling 1,044,500 feet.

This timber was cut, with other timber, on the Menominee Indian Reservation, under authority 53369, dated August 13th, 1897, under the provisions of the act of June 12th, 1890 (26 Stats. 146) providing for the cutting of the pine timber on the Menominee Indian Reservation.

The logs cut on lands claimed by the State of Wisconsin, 363 and other logs cut by the Menominee Indians were sold on March 15th, 1898, to Berley Lowe and Co., of Chicago, Illinois, for thirteen dollars and sixty cents per thousand feet. The scale was approved by the Department under date of March 25th, 1898, authority 55997. The logs were resold by Perley Lowe and Co., to S. W. Hollister of Oshkosh, Wisconsin.

On or about April 30th, 1898, the authorities of the State of Wisconsin attached or seized the whole amount of logs cut and banked by the Menominee Indians on the south branch of the Oconto River and now claim thirteen dollars and sixty cents per thousand feet for the logs cut from the lands claimed by the State of Wisconsin.

I would state that the trespass (if a trespass) was not malicious or wilful, and in my opinion that the demand of the State of Wisconsin for payment for the logs cut on lands claimed by it is exorbitant and excessive and should not be allowed.

It is my opinion that the cost of cutting and banking the logs should certainly be deducted from the price the logs sold for.

It cost to cut and bank the logs claimed by the State as follows:

Logs cut on Section 1, Tp. 30 N. R. 16, East, 883 trees, 698,000 feet. These logs were cut and banked by Eliza Fredenberg, Contract No. 19, and she was paid \$4.50 per thousand feet for cutting and banking the same.

The Logs cut on Sec. 9, Tp. 30 N. R. 16 E. 119 trees 170,000 were cut and banked by Barney Stone, Contract No. 7, and he was paid \$4.25 per thousand feet for cutting and banking the same.

The Logs on Sec. 29 TP. 30 N. R. 16 E., 9 trees 6,500 feet 364 were cut and banked by William Kinney contract No. 51, and he was paid \$4.40 per thousand feet for cutting and banking the same.

The logs on Sec. 32 Tp. 30 N. R. 16 E. 173 trees 170,000 feet were cut and banked by Rachel Warrington contract No. 28, and she was paid \$4.50 per thousand feet for cutting and banking the same.

(Copy 2.)

I would say that it has always been the custom in this vicinity that when a trespass of cutting timber has been committed that was not malicious or wilful to settle with the owner of the timber for what the standing trees or stumpage was worth, and as the standing trees or stumpage on this land claimed by the State was worth in my opinion, about \$8.00 per thousand feet I think that the State of Wisconsin ought to settle on that basis, if they have a just claim.

Copies of the logging contracts are on file in the Indian Office.

Very respectfully,

D. H. GEORGE,
U. S. Indian Agent.

Certified a true copy from pages 23-26 of the official letter book July 1, 1898 to June 30, 1899, Record of Keshena Agency.

H. P. MARBLE,
*Assistant Superintendent, Keshena
Indian School, Keshena, Wis.*

365

P. Ex. No. 125.

Copy.

GREEN BAY,
KESHENA, WISCONSIN,
November 6th, (1897).

Hon. Com. Indian Affairs, Washington, D. C.

SIR: I have to honor to acknowledge the receipt of your communication of November 1st inst., Land 43408-1897, relative to the sixteenth sections in the townships comprising the Menominee Reservation.

In reply I would say that I understand from your letter that the Menominee Indians have the same privilege to cut and bank timber under the Act of June 12th, 1890 (26 Stats., 146), from the sixteenth sections on the Menominee Reservation as from any other portion of the Reservation. If I am correct in my conclusions I desire to give Indians contracts, under the Act of 1890, to cut and bank logs from the sixteenth sections on the Menominee Indian Reservation during the logging season of 1897-'98. But before letting any contracts to cut and bank timber on those sections I respectfully ask for definite instructions as to whether I shall or shall not allow the Indians to cut the timber.

The timber on some of these sections is in constant danger of fire, as the timber surrounding has been cut, and if the Indians are to receive the benefits from the timber it should be cut this winter.

Respectfully asking for early instructions, I remain,

Very respectfully,

D. H. GEORGE,
U. S. Indian Agent.

368

Certified a true copy from pages 145-46 letter book August 4, 1897, to July 1, 1897, records of Keshena Agency.

H. P. MARBLE,
*Assistant Superintendent Keshena
Indian School, Keshena, Wis.*

367

P. Ex. No. 126.

Copy.

GREEN BAY,
KESHENA, WISCONSIN,
April 7th, (1898).

Hon. Com. Indian Affairs, Washington, D. C.

SIR: I have the honor to transmit herewith an approximate estimate of the pine timber cut from lands on the Menominee Indian Reservation claimed by the State of Wisconsin as made by the superintendant of logging.

If an exact scale of the timber cut is required, it will be necessary to have the land surveyed and each stump and top of all trees cut measured, which will require additional help and a long time to do.

On the lands claimed by the State that I do not report as timber having been cut there is little if any pine timber and it has not been cut.

Very respectfully,

D. H. GEORGE,
U. S. Indian Agent.

The diagram showing the lands is *herein* returned.

Certified a true copy from page 383 official letter book August 4, 1897, to July 1, 1898, record of Keshena Agency.

H. P. MARBLE,
*Assistant Superintendent Keshena
Indian School, Keshena, Wis.*

Copy.

Estimate of Pine Timber Cut from Lands Claimed by the State of Wisconsin on the Menominee Indian Reservation.

Description.	Sec.	Tp.	R.	Amount.	Remarks.
S. E. 4 of S. E. 4	4	29	15	75,500	Cut under Agent Kelsey.
N. E. 4 of S. E. 4	"	"	"	75,000	" " and agent Savage.
S. W. 4 of N. W. 4	"	"	"	350,000	
N. E. 4 of S. E. 4	6	"	"	150,000	Cut Winter 1897-'98.
S. E. 4 of S. E. 4	"	"	"	125,000	"
S. W. 4 of S. E. 4	"	"	"	35,000	
S. E. 4 of N. W. 4	7	"	"	20,000	Cut under Agent Savage.
N. E. 4 of N. W. 4	17	"	"	20,000	"
S. E. 4 of S. W. 4	"	"	"	20,000	"
N. E. 4 of S. W. 4	"	"	"	10,000	"
S. W. 4 of N. E. 4	18	"	"	100,000	" and Agent Kelsey.
S. E. 4 of S. E. 4	12	30	15	75,000	Cut under Agent Kelsey.
N. E. 4 of S. E. 4	"	"	"	100,000	"
S. W. 4 of N. E. 4	1	30	16	620,000	Cut under Agent Savage.
N. W. 4 of N. E. 4	"	"	"	438,000	
N. W. 4 of N. E. 4	"	"	"	250,000	Cut winter of 1897-'98.
S. E. 4 of N. E. 4	"	"	"	200,000	" also 150,000 cut years ago, under
N. 2 of S. E. 4	"	"	"	50,000	" Agent Jennings.
N. E. 4 of N. E. 4	"	"	"	350,000	Cut winter of 1897-'98 about 75,000 feet.
N. W. 4 of N. W. 4	9	"	"	200,000	(rest indistinct)
S. W. 4 of N. W. 4	"	"	"	10,000	Cut under Agent Savage and winter 1897-'98.
					Cut winter 1897-'98.

S. E. 4 of N. W. 4	"	"	"	95,000	"	under Agent Savage.
N. E. 4 of S. W. 4	"	"	"	30,000	Cut under Agent Savage.	
S. E. 4 of S. E. 4	17	"	"	50,000	"	Kelsey.
369						
N. W. 4 of N. E. 4	21	"	"	50,000	"	farm of five acres & hom-
S. W. 4 of S. E. 4	24	"	"	150,000	"	distinct).
N. E. 4 of N. E. 4	25	"	"	150,000	"	& Jennings. A farm.
N. W. 4 of N. E. 4	"	"	"	150,000	"	Agent Jennings. (Rest indistinct.)
E. ½ S. E. 4 & S. E. 4	26	"	"	100,000	"	Kelsey.
Amt. for'd.				<u>4,038,000</u>		
S. E. ¼	29	30	16	350,000		Cut under agents Kelsey and Savage.
E. ½ & S. W. 4 of						
N. E. 4	29	30	16	150,000		"
"	"	"	"	50,000		Winter 1897-'98 small farm on S. W. 4 of S. E. 4.
Total				<u>4,588,000</u>		but not now occupied.

Fires have run through all the cuttings except where timber was cut last winter, but it is impossible to designate the years. In nearly every case the fires have occurred after the timber was cut.

Certified a true copy from pages 384-85 official letter book Aug. 4, 1897, to July 1, 1898, records of Keshena Agency.

H. P. MARBLE,
Assistant Superintendent Keshena
Indian School, Keshena, Wis.

370

P. Ex. 128.

Copy.

Data on Sixteenth Sections from Report of Thomas H. Savage, U. S. Indian Agent to the Commissioner of Indian Affairs as found on page 305 of Annual Report of the Commissioner for 1897.

Sixteenth Sections.—on the Menominee Indian Reservation there are ten sections of land containing 6,400 acres that the State of Wisconsin claims to own as school lands. On these sections is much valuable pine timber, and the State has sold a portion of the land on which this timber stands to various individuals. A few years ago an Indian cleared a small farm on one of the Sixteenth sections, hauling the timber cut to the river to be sold by the Agent for his benefit, as was then the custom. The purchaser of the lands from the state seized the logs, claiming that the Indians had no right to sell the logs. The case was carried to the Supreme Court of the United States, which decided that the Indians had the right of occupancy of these sections only. That the title or fee was in the State or its assigns, and that if the Indian right of occupancy was ever extinguished that the State or its assigns would own the land.

When the Menominees were given their reservation in 1854 by the Government, no reservations were made of the sixteenth sections. The land they were to have is described in the treaty as—

That tract of country lying upon the Wolf River, in the State of Wisconsin, commencing at the southeast corner of township
371 28 North of Range 16, East of the Fourth Principal Meridian, running west 24 miles, thence north 18 miles, thence east 24 miles, thence south 18 miles to the place of the beginning the same being townships 28, 29 and 30 of Ranges 13, 14, 15, and 16, according to the public surveys.

Two of these townships were afterwards sold to the Stockbridge and Munsee Indians for the Reservation leaving the Menominees ten townships of land, which they now occupy as a reservation. The ten sections claimed as school lands by the State are valuable, as there is considerable pine timber and the most of the land is good farming soil. The pine timber surrounding some of these sections has been cut, thus exposing the pine standing on the sixteenth sections to constant danger of being destroyed by fire or wind.

If Congress would pass an act to have the ten sections examined and appraised and to either pay the Indians the value of them or else purchase the title for them, it would not only be an act of justice to the Indians, but would fulfil the treaty obligations entered into by the Government with them.

Certified a true copy from page 305 of annual report of Commissioner of Indian Affairs for 1897.

H. P. MARBLE,
Assistant Superintendent,
Keshena Indian School, Keshena, Wis.

* * * * *

372 Testimony taken at Washington, D. C. at the Office of the Commissioner of Indian Affairs, 9 A. M. June 22nd, 1816.

John C. Thompson and R. A. Hollister appearing on the part of the Complainant, and

C. Edward Wright and Villard Martin, on the part of the Defendant.

The Defendant called J. P. KIMMEY, who being duly sworn testified as follows:

Direct examination by Mr. Martin:

Q. What is your name.

A. J. P. Kinney.

Q. Where do you reside.

A. Washington, D. C.

Q. What if any official position do you hold.

A. Supervisor of Forests in the Indian Service.

Q. In the Department of the Interior.

A. Yes sir.

Q. How long have you been in the Indian Service.

A. Slightly over six years.

Q. Where is your office.

A. I am the general field man.

Q. Where is your office at the present time.

A. In the headquarters at Washington.

Q. How long have you been in Washington, in the Indian Service.

A. Why, I have been in the Indian Service 6 years part of the time in the field and part of the time in Washington.

Q. Are you familiar with the affairs of the Menominee Indians generally.

373 A. With their timber affairs and in a general way with everything connected with the Menominees.

Q. During the time that you have been in the employ of the Indian Office have you had occasion to examine the files of that office.

A. I have.

Q. Are you familiar with the filing system.

A. I am.

Q. Have you recently made an examination of the files in the Indian Office in the city of Washington.

A. I have.

Q. What period of time did that examination cover.

A. I suppose you have reference to the Menominees?

Q. With reference to the Menominee Indian Affairs.

A. I have recently examined the records regarding the Menominee Indian Affairs from October 1848 until the end of 1854.

Q. What was the purpose of your examination.

A. To ascertain during that period whether any notification was given to the Menominee Indians that they should remove from the lands in Wisconsin, ceded by the treaty of 1848.

Q. As provided in Article 8, of the treaty of 1848.

A. Yes sir.

Q. What was the result of that examination.

A. I find no record in the Indian Office of a formal notification to those Indians that they should remove from the lands ceded in the treaty of October 1848.

Q. Have such notice been given would the same appear in the records of the Indian Office which you examined.

Complainant objected as incompetent, irrelevant and immaterial and manifestly a conclusion of the witness.

A. It would.

Defendant offered in evidence letter marked Defts Ex A as follows:

374 "To the President of the United States:

The undersigned Chiefs and headmen constituting a deputation from the Menominee Nation of Indians who reside in the State of Wisconsin, and within the superintendency of the sub-agency of Green Bay, beg leave to lay the following statement before the Great Father, the President of the United States.

On the 18th day of October, 1848, the Menominee nation made a treaty at Lake Powan-hay-kon-nay with Colonel William Medill, a commissioner on the part of the United States, which treaty was ratified by the Senate of the United States, on the 19th day of January 1849. By the 2d article of this treaty they ceded to the United States "All their lands in the State of Wisconsin wherever situated." By the 3d article the United States, in consideration of this cession agreed to give them "for a home," where they should hereafter reside, "all of that country or tract of land ceded to the United States by the Chippewa Indians, of the Mississippi and Lake Superior, in the treaty of August 2d, 1847, and a Pillager band of Chippewa Indians, in the treaty of August 21, 1847, which may not be assigned to the Winnebago Indians under the treaty with that tribe of October 13, 1846, and which is guaranteed to contain not less than six hundred thousand acres."

By the fourth article, the United States agreed to pay "in further and full consideration of said cession", the sum of \$350,000.

By the 7th article they were permitted to remain on the lands ceded by said treaty and at their present homes "during the period of

two years from the date" of said treaty, or until the 18th day of October 1850," and until the President shall notify them that the same are wanted.

They have already been notified that the United States will expect them to remove to the new home set apart for them
 375 in this treaty, according to the terms of said seventh article that is by the 18th of the Approaching month of October.

They were told by the Commissioner, that the negotiation of this treaty, that if the country thus set apart for them on the west side of the Mississippi River, was not a good country and such as would furnish them with game and other means of subsistence, the United States would provide for them another, suitable to their condition and habits. With a view of ascertaining whether it was such a country, they have, during the past season, sent a portion of their chiefs to look at and examine it, who have reported to their nation that it is not such a country as will furnish them with the necessary means of subsistence, and, especially, that it is very poorly supplied with such game as they have been accustomed to use for their winter supply.

They have but little doubt that they would be subjected to great suffering if they were forced to occupy it,—and, especially if they were required to remove to it, by the time fixed by the said treaty. They therefore pray their great father that he will countermand the order for their removal during the present fall, and that the matter may be left open for future consideration, in as much, as they have other very important matters, growing out of the making of said treaty, to lay before their great father. It is important to them that these last named matters should be decided and finally disposed of before their removal,— For if they are not, the act of removal will give such force and validity to said treaty, that it may be thereafter employed as an argument why their grievances should not be redressed. Their Great Father will also see that the season is now so far advanced that if they are required — their present home by
 376 the 18th of October, their removal will then take place almost in the dead of winter, which sets in very early, in that northern climate, and at a time when they and especially their women and children, will be exposed to a great deal of suffering from cold.

They are not willing to believe that their Great Father will subject them to this suffering, when it is not necessary that they shall remove now, and when their lands ceded by them in Wisconsin, cannot, at present, be brought into market.

If their Great Father shall *great* their prayer, they hope to show him hereafter, in the most satisfactory manner that they were imposed on by Col. Medill when he made said treaty, in a manner which they do not think their Great Father will approve.

He told them, in Council, that they did not own more land in Wisconsin than from one and a half to two and a half millions of acres. He exhibited to them a map, which he said was made at Washington setting forth the boundaries of their land and showing what he represented as the quantity owned by them. They also had a map of their country which was shown to him as containing the lands set

apart and recognized as theirs by their former treaties with the United States, but he refused to have anything to do with it, and persisted in his aforesaid presentation of the quantity, denying that they had any title whatsoever, beyond the lines laid down on *his* map.

He told the nation that he would, not give them more than the \$350,000, for said lands, and threatened them with the authority of the United States and its power to remove them at its pleasure, if they did not sign the said treaty.

He threatened to degrade those of their chiefs, who opposed the treaty, if they did not consent to the terms, which he proposed, and declared that, if they persisted in refusing, to sign it, he would
377 remove them and appoint other chiefs who would sign it. Thus he induced some of their chiefs to sign said treaty from fear, and because they supposed that the United States would force them off their lands if they did not willingly sell and cede them.

He told them, expressly, that if they signed the treaty, and the country — apart for them on the west side of the Mississippi was not good and suitable for them, they should be removed to a better country somewhere else.

Although he professed to have the boundaries of all their land marked out on his map, yet he did not describe the land ceded in the treaty by these bounds,—— He made the treaty read so as to cede “all their lands in the State of Wisconsin, wherever situated”, so as to include what was marked off on their map as well as his. When he returned to Washington he represented to Congress, in his annual report for 1848-49 that he had purchased of them, by this treaty a tract of country “containing 4,000,000 acres” which was nearly or twice as much as he represented to them that they owned.

The undersigned do not enter into detail of these matters, because it is not now necessary. They refer only to the foregoing facts to show that they have good and sufficient reason for asking that they may not now be required to remove. If their Great Father shall grant them this request, they think they can lay before him such disinterested evidence of the bad faith practiced towards them by Col. Medill as will satisfy him, that some relief, beyond the terms of said treaty, should be granted *them* said nation.

They hope their Great Father will consider of their condition and grant their prayer, so that they can return home and assure their nation that he is their friend, and that he will not suffer his officers to impose upon them because they are red-men.

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OSH-KOSH	his x mark.
REE-CHEE-NEW	his x mark.
SHOW-RUNO-PERNESSE	his x mark.
LAMOTTE	his x mark.
CORROW GLANDE	his x mark.
WAU-KEE-CHE-UN	his x mark.
SHO-REE-NIEW	his x mark.
SAGE-TAKE	his x mark.
CHE-QUE-TUM	his x mark.

Done in the presence of

JOHN B. JACOBS,

REV. J. F. BONDUEL,

*Superintendent and Pastor of the
Menominee School and Chapl-in.*

HORISCHABALL KALDWEIL his x mark.

GEORGE COWN.

(Endorsed:) Memorial of Menominee Delegation, Indian Office.
Sept. 4, 1850.

The within was read by the Hon. R. W. Thompson at the expressed request of the Indians as indicated thro- their interpreter with a request that it be laid before the acting Sec'y of the Interior and their Great Father.

CHARLES E. MIX.

Defendant then offered in evidence Def'ts Ex. B as follows:

D. T. O. T. A.

379 SIR: Your several communications of recent date, respecting the state of affairs in the Menominee Country, and in relation to questions growing out of the execution of the late treaty with those Indians have been received by the hands of Col. Childs, who has been fully conferred with on the subject to which you call the attention of the Department.

The difficulties which have arisen are much to be regretted, as they may have an untoward influence upon the interests and welfare of the Indians, which are so nearly connected with their early removal and quiet settlement in this new country; but the conduct of the Menominees in refusing to send off the delegation to explore that country, as provided in the treaty, with the view of fixing upon a proper location for the tribe has caused no little astonishment and will excite much regret, if not displeasure in the mind of their Great father, the President, now absent from the city for a short time, when he hears of it, can only be attributed to improper influence exercised over them by designing white men for purposes of their own, and which are opposed to the interests and welfare of the Menominees, or to a disposition on their part, to practice deception and bad faith towards the government, or to their being no better than children, who know not what is best for them, and are disposed to act wilfully without regard to consequences. That people so well informed as the Menominees generally are, and who so well know the evil they have already suffered from remaining in their present position, and the importance of ridding themselves of them by making early arrangements to settle comfortably in their new

home west of the Mississippi, would act as they have done, is indeed a matter of surprise as well as regret.

380 Their complaints are unreasonable and unfounded; the printed copy of their late treaty, sent to them through you, is the same, word for word, as that which they signed and yet they foolishly and without any specification or explanation undertake to question it, the moneys which they were first entitled under that instrument were sent to them as soon as the proper and necessary arrangement therefor could be made, and it could be done, but without any well grounded reason they complain of delay; and they undertake with as little cause to find fault because the amount stipulated for the individual improvements on the lands ceded has not been sent. The treaty stipulates no time for the payment of this sum, and in fact they are not or right entitled to it until they remove and abandon the improvements; nor could it be sent with propriety until the improvements had been valued and the valuation sent on to this department so that it could see the result and whether it had been properly worded and was correct, and give any instructions that might be necessary in relation to the payment of the money.

Their objections to do what the government desires them and that only for their own good which is its first and chief object are alike frivolous and unreasonable, but they appear determined not to be satisfied and to make difficulties without cause, so that it seems almost useless to attempt to please them. They must be given clearly to understand that the government will not be trifled with and treated with disrespect; and that they must, in good faith prepare themselves to comply honorably with their treaty obligations, or they will be compelled to do so, and not only this but that not another dollar will be paid to them while they remain where they are and behave as they have done beyond the \$30,000, under the first clause of the fourth article of the treaty; and that would be withheld so

381 long as they did not manifest a proper spirit of compliance with their obligations if that instrument did not require it to be paid as soon as convenient after being appropriated by Congress. If therefore they wish to receive their moneys next year, and not to be compelled to remove by Military force, without getting them, immediately after the expiration of the two years they stipulated in the treaty for them to remain where they are, they will at once change their conduct, listen to the advise of the agents of the government, and without delay, and in good faith, send off the exploring party to examine their new country, if they will do this the Department is willing to gratify them by paying the improvement money at once, and in the hope that they will, it will immediately be remitted to you. Though the amount of the schedule furnished by you does not quite equal the sum set apart by the treaty towards the object, the whole will be sent in order that you may have the means of rectifying any accidental errors, if any, which may have been committed in preparing the schedule, and this document is herewith returned lest you may not have retained a copy of it.

In regard to the payment of the \$30,000, I have to remark with

regret that the formal appointment by you, or through your instrumentality of persons to act as commissioners to examine into the debts of the Indians, cannot be recognized or sanctioned. The department has nothing to do with any debts owed by them. They or at least the chiefs into whose hands the moneys payable by the government doubtless know what they justly owe as national debts, and the latter are competent to make a proper disposition of the money unless swayed by improper influence, and what the Dept., sought in its instructions on the subject was that you and Mr. Wister

382 the commissioner for distributing the fund for the mixed bloods should exert yourselves to counteract as far as possible any such influence and to render them any incidental advise and assistance in your power as to the disposal of the fund with reference to the objects to which it was intended to be applied. Its application was to be determined by themselves. The payment of the money as is specifically required by the treaty, absolves the government from all further responsibility or duty in relation to it except to do what and was required of Mr. Wister and yourself, you are therefore instructed to adopt this course, and it is hoped that you will have the assistance of the Military, for which application has been made as you will perceive from the accompanying copy of a letter of this date to the Secretary of War in time to aid you to preserve peace and preventing the Indians from being improperly interfered with.

You will perceive from the above mentioned letter that is to be your relations towards the Military and the general objects to which you are to direct your joint attention.

The question of power to remove intruders from the lands occupied by the Indians, and to restrain others from going there, is one of great delicacy and involving important considerations, should be fully considered, and instructions on the subject given you with as little delay as practicable, so that you may receive them by the time the Military reaches the country.

The conduct of Charles Corrow or Corron requires no action as he has been arrested and the case in the hands of the judicial authority of the State.

You- nomination of William Powell as interpreter in place of Chas. A. Grignon is approved,

Very respectfully,

O. B.

383 W. H. Bruce, Sub. Agt. Green Bay, Wis.

Endorsed. August 4, 1849, from Hon. O. Brown in answer to several communications received from W. H. Bruce respecting the difficulties in removing the Menominee Indians. L.

XXII.

Q. Approximately what length of time was your examination of the records for the purpose of ascertaining whether the Indians have been notified in accordance with sec. 8 in the treaty referred to,

- A. The greater part of the time each day for about two weeks.
Q. Was your examination careful and thorough.
A. Yes, I considered it so.

Cross-examination by Mr. Thompson:

Q. You have been field man during a large part of the six years that you have served in the Indian Department.

A. Yes sir.

Q. And you have been engaged in field work a large part of the time.

A. Less than half of the time.

Q. But somewhere around half.

A. That is I have been engaged in field work away from Washington considerably less than half the time; my work at Washington is largely and almost entirely in connection with field problems.

384 Q. In Deft's Ex. A. offered in evidence while you were on the stand is it stated in the petition of the Indians "they have already been notified that the United States will expect them to remove to the new home set apart for them," in the treaty of 1848, and I understand that you do not find in the files the original order to that effect.

A. I did not.

Q. When you state that any paper could be in the files you of course mean if it were not lost or mislaid or accidentally destroyed or something of that kind.

A. Yes sir. I want to qualify that last answer I find no record of any paper of that kind, in other words if the paper had been lost there should be in the records of the office evidence of the existence of such a notification and I did not find a record of the existence of any such notification.

Q. You did find did you not the original of Ex. A. which has been offered.

A. I did.

Q. And that of course does refer to such a notice does it not.

A. It does.

Q. That would be probably an executive order would it not under the terms of the treaty.

A. It should be.

Redirect examination by Mr. Martin:

Q. The records of this office would either disclose the original executive order or the record of such an order would they
385 not, if any such had been given.

Complainant objected as calling for a conclusion of the witness.

A. They should show it.

Q. The records of the Indian Office do show extensions of time granted by the President from time to time.

A. They do yes sir.

Q. Then the records do show executive orders in regard to the Menominee Indians.

A. Yes sir.

Q. And you did not find any executive order in accordance with the provisions of sec. 8 of the treaty of 1848.

A. I did not.

By Mr. Thompson: The Executive orders extending the time that you found were rather informal, frequently endorsed on a letter or something of that kind, by the executive office of the President, were they not.

A. I remember one was endorsed simply on the back of the letter.

By Mr. Martin: How about the others.

A. The executive order of Sept. 5th, 1850, extending the time within which the Menominees might remain on the lands until June 1st, 1851, was in the form of a letter to the Secretary of the Interior signed by President Millard Fillmore.

By Mr. Thompson: How about the orders of May 29th, 1851.

A. The letter of May 28th, 1851, from Commissioner Luke Lea to the Secretary of the Interior recommending an extension of the time for the Menominees to remain on ceded lands until June 1st, 1852, was endorsed with a recommendation of approval on the back by Alex. H. H. Stewart, and by the approval of May 29th, 1851, by President Fillmore.

386 By Mr. Martin: I believe you stated on your direct examination you found a formal notification, did you find any kind of a notification by the President in accordance with Sec. 8, of the treaty of 1848.

A. No sir. No notification by the President.

By Mr. Thompson:

Q. In that letter of endorsement by Alex. H. H. Stewart there is a letter to R. W. Thompson, Esq., for the Menominees have you got that letter or a copy.

A. I have no copy of that letter.

Q. I want to know whether you have found the original.

A. I could not find the letter referred to in the Secretary's endorsement.

Q. It was evidently at one time in the files of the Indian Department was it not.

A. Yes, sir.

Q. And it has been in some way mislaid or lost or destroyed.

A. I found that when certified copies of the files of the office were furnished Eberlein and Larsen of Shawano, Wisconsin on Jany. 15, 1916, in regard to Menominee matters the first page of a letter of April 25th, 1851, of R. W. Thompson, to the President was furnished them, I was unable to find this first page.

Q. Did you find the second page.

A. I found none of that.

Q. I have a typewritten copy of what I suppose is the first page as shown by the photographic copy prepared here, and I want to ask if you remember reading the original at the time the photographic copies were made.

A. You mean at the time they were made for Eberlein and Larsen.

387

Q. Yes.

A. No sir, I didn't see the papers at that time.

Q. In that copy of a letter to President of the United States from R. W. Thompson it speaks of the removal of these Indians west and says, "the time for which is fixed by yourself is the first of the coming month of June," do you remember that.

A. I have never seen that paper.

Q. Now in reference to the extension by the President of June second, 1852, was that a mere endorsement on a letter from the Commissioner of Indian Affairs to the Secretary of the Interior.

A. I did not find a letter from the President making this extension, I found a reference in office letter book No. 46, page 132 in which Elias Murray, Superintendent of Indian Affairs at Sheboygan, Wisconsin, was advised on June 3d, 1852, that the President had extended the time for the removal, of the Menominee Indians until the first day of October, 1852.

Q. We have here Ex. J. in the Bill of Complaint which is admitted in the answer and which is a copy of a letter from Commissioner Lea to Alex. H. H. Stewart, June 1, 1852, with reference to the extension until October 1st, 1852, and on which there is endorsed, "ordered according to the recommendation of June 2d, 1852, Millard Fillmore," you did not find that in the files on this search, you have just made.

A. I did not find that.

Q. Have you with you a photographic copy of a letter Sept. 7th, 1850, from the Acting Secretary of the Department of the Interior to the Acting Commissioner of Indian Affairs, referring to a letter of President Fillmore of Sept. 5th, 1850, in which letter he gave the Indians permission to remain until the 1st of June next.

A. Yes sir.

388

Q. Will you read that letter into the record.

"DEPARTMENT OF THE INTERIOR.

Washington, Sept. 7th, 1850.

SIR: The petition of a delegation from the Menominee tribe of Indians presented at the request of the delegation by Hon. R. W. Thompson, has been considered by the President of the United States to whom it is addressed. His action thereon, so far as related to their application to be permitted to remain temporarily at their present location is shown in the accompanying copy of his communication to this department of the 5th instant. You will

inform sub-agent Bruce of the decision of the President in the premises.

Very respectfully your obedient servant,

B. C. GODDARD.

A. F. Lowry, Esq., Acting Commissioner of Indians, Acting Secretary.

Defendant objected as incompetent, irrelevant and immaterial.

Q. Now, I notice that you have in connection with that letter of September 5th, 1850, a photographis copy of a letter or copy of a letter of the President of September 5th, 1850, you can tell me whether that is a photographic copy of the original letter or a copy.

389 A. It is a photographic copy of a copy.

Q. So that in this search you found a copy of President Fillmore's letter instead of the original.

A. Yes sir.

Q. You did not find the original executive letter in the files on this examination.

A. No sir. The original is probably in the files of the Interior Department, the Secretary's office.

A. The Indian Department is usually furnished with copies of Executive orders.

A. Yes, and all other letters frequently written to the Secretary by the President.

Q. You have made no examination of the files of the Interior Department as distinct from the Indian Department.

A. I have not.

By Mr. Thompson: There is no question, is there but what Ex. B, attached to our bill is the same order or letter of the President of which Mr. Kinney has just shown us a photographic copy of a copy.

By Mr. Martin: No question about it.

Redirect examination by Mr. Martin.

Q. You testified on cross examination in regard to a certain letter from the President to the Secretary of the Interior being on file in the Secretary's Office, in this connection I will ask you whether there would be on file in the Indian Office the Order, a copy of the order, or the reference to an order if made by the President in accordance with the provisions of sec. 8, of the treaty of 1848, relating to the removal by the Indians from the lands claimed.

390 A. There would undoubtedly be a copy of the order or a letter from the Secretary to the Commissioner of Indian Affairs advising him that such an order had been issued.

Q. There is no such copy and no such letter on record in the Indian Office that you have been able to find.

A. I find no such order or a reference to such an order.

Recross-examination by Mr. Thompson:

Q. What you mean is that a copy of such an order or a letter advising the Commissioner of Indian Affairs or the making of such an order should properly have been sent to the Indian Department.

A. Yes, sir.

Q. That would be the *un*-sual way of doing things.

A. Yes, sir.

Q. And you have in your examination gone over such files as you could conveniently find here at this time have you not.

A. I have searched all the files regarding the Meneminee Indians during the period from October, 1848, until the close of 1854.

Q. And your testimony really is that at the present time you cannot find such an order or a copy of an order here.

A. No, sir, nor a reference to such an order.

Q. You don't mean to say that such an order might not — been in the files or copy been in the files, and the same mislaid or lost or something of that kind happen to it.

A. I should think it very improbable there would be no reference to it even though it had been lost.

Q. I didn't ask you about the probability, records do some-
391 times get lost even in a department do they not.

A. Yes, sir.

Q. And quite frequently get mislaid.

A. Occasionally mislaid.

Q. And you are really testifying in your search at this time you could not now find that copy or any reference to it.

A. Yes, sir.

Q. Now when you say no reference to it there is a reference to it in the petition of the Indians which has been offered in evidence is there not.

A. I don't think so.

Q. You don't find in the index any reference to it.

A. No, sir, and I assume that the reference in the petition of the Indians is probably due to the statement in a letter from the Commissioner of Indian Affairs to sub-Agent William Bruce at Green Bay that the Indians would be expected to remove from the lands ceded within the two years allot-ed in the treaty.

By Mr. Martin: That is the letter which the defendant has offered in evidence as Defts. Ex. B.

A. Yes, sir.

By Mr. Thompson: You also found in the correspondence that the Military forces were after the date of Ex. B, ordered out to see that the Indians performed the stipulation in the treaty, did you not.

A. I did not; I found the Military were ordered to Fort Howard about this time to forestall any trouble with the Indians who were complaining in regard to the manner in which the treaty had been made.

Q. That testimony of yours must be based on some document that you have read.

392 A. Yes, sir.

Complainant moved to strike out the answer as not being the best evidence.

Q. Perhaps a little explanation, the letter of Orlando Brown, of Aug. 28th, 1849, states that the purpose of the Military forces was to "exercise the proper influence over both Indians and whites, and if not to prevent an outrage and possible bloodshed to convince the former that the Government is determined that they shall comply with the treaty obligations, and the latter that they cannot be permitted to violate the rights of the Indians, does it not.

A. Yes; early in the summer of 1849, sub-agent William H. Bruce and Col. —

Q. These statements you are now making are based on information from documents on file in the Department are they not.

A. Yes, sir.

Complainant objected as not the best evidence.

Defendant offered in evidence Defts. Ex. C, to which there is no objection Except that the witness will explain certain things contained therein.

The Defendant called THOS. C. HAVELL, who being duly sworn testified as follows:

Examination by Mr. Hollister:

Q. Did you prepare Defts. Ex. C.

A. I did.

By Mr. Martin: And it is further agreed that this Defts. Ex. C. is correct.

By Mr. Thompson: It is agreed he will testify it is correct
393 except as explained.

By Mr. Martin: You do not object on account of its not being original.

By Mr. Thompson: No.

By Mr. Martin: I hand you Defts. Ex. C, and ask you to state what it is.

A. It is a statement prepared by me concerning the surveys of townships 28, 29 and 30 ranges 3, 14, 15, and 16 east of the 4th Principal Meridian, Wisconsin, showing dates as represented by the surveying archives and other papers relative thereto in the General Land Office of the surveys of these townships.

Q. Are you employed in the General Land Office.

A. Yes, sir.

Q. In what capacity.

A. Clerk and Surveyor.

Q. How long have you been there.

A. About 17 years.

Q. What experience have you had with surveys and examination of surveys, and field notes.

A. I qualified to my present position through an examination in the Civil Service and throughout my entire service I have been engaged in work incident to the examination of boundaries of surveys.

Q. Is Def'ts. Ex. C. a true and correct statement of the records of the General Land Office, with reference to the matters that it purports to show.

A. It is to the best of my ability.

By Mr. Martin: There is no objection to it on account of its form.

By Mr. Thompson: No objection to its introduction in evidence except as it may be shown to be incorrect according to his
394 explanations later on or different from some plat heretofore offered, subject to the right to correct if we discover any incorrectness later.

By Mr. Martin: May the record show there is no objection to the form of this statement.

By Mr. Thompson: No objection to the form at all.

By Mr. Martin: And no objection that the original records are not produced.

By Mr. Thompson: No.

By Mr. Hollister:

Q. In Def'ts. Ex. C. pertaining to town 28 range 14, appears the words "re-surveyed December 18, — 22, 1890"; what does that mean.

A. That means that the east boundary of township 28, north of range, 14 east, was surveyed on those dates.

Q. If you know how did it happen that a resurvey of this east boundary of 28, -14 was made in 1890.

A. The east bound-ry of Township 28 north of range, 14 east was originally surveyed in October, 1852, and in 1854, the sub-divisions of that township were run but the adjoining township to the east namely, township 28 north of range 15, east, was not sub-divided until 1890 or 1891, and it was in connection with the sub-division of this latter township that the east boundary of the first main township was re-run in order to identify the existing original corner monuments.

Q. You do not under-stand that the re-survey of the east boundary of 28-14 changed the original survey made in October, 1852.

A. The records shows that the original survey of the east boundary of township 28-14 east was not changed in any respect.

Q. And the object in making this re-survey was to enable
395 the surveyor to survey the town east which had never been subdivided.

A. That is correct.

Q. And the reason you have included this reference to the re-survey of this east boundary was merely because it appeared in the records in the land office.

A. It was in order that a completer record could be furnished.

Q. But not with the idea of showing any change in the original survey of this town.

A. It was not.

A. Now I notice in Defts. Ex. C. that there have been re-surveys of one or more boundaries in towns 29-14, 29-15, 29-16, 28-15, 30-15, and 28-16.

A. I think that is alright as you have them there.

— Does the same explanation apply to these surveys or re-surveys of the boundaries of the above named towns as to the re-survey of the east boundary of 28-14.

A. It does.

Q. And none of these re-surveys of boundaries referred to in any way change the original surveys of the town.

A. They did not change the original boundaries of the surveys referred to.

Q. And these lines which were run in 1890 were made to get the outer boundaries of the two townships which had not previously been sub-divided.

A. Yes, sir.

Defendant offered in evidence Defts. Exs. D, E, F, G, H, and I.

Complainant objected as incompetent, irrelevant and immaterial. But not as to the form or the fact they are certified copies or anything of that kind.

396 By Mr. Martin: You admit for them for all purposes for which the originals would be competent.

By Mr. Thompson: Yes, they are objected to as incompetent, irrelevant and immaterial by with the understanding that so far as they may be competent, relevant or material they may be received the same as the originals.

By Mr. Martin: As to the records offered by the Complainant from the records at the land office at Madison, Wisconsin, defendant objects as incompetent, irrelevant and immaterial, but no objection is made on account of the fact that they are copies of the originals and the same are admitted with the same force and effect as the originals if competent and no objection as to the time at which they were offered.

At WASHINGTON, June 23rd, 1816.

Defendant offered in evidence the following subject to the objection of the Complainant, which was made, that the same was incompetent, irrelevant and immaterial but no objection was made to the introduction there of, on account of the form in which it is presented or the fact that it is secondary evidence and not the original, and it is received with the same force and effect as if it were the original subject to the above objection, and provided that the Complainant may offer similar evidence in rebuttal.

- 397 *Letter from E. Murray, Superintendent, Menominee Indians, of November 2, 1852 to the Commissioner of Indian Affairs found at page 325, House Document No. 1, Containing the Report of the Commissioner of Indian Affairs, dated November 25, 1852, said Letter being a part of said Report:*

FALLS OF WOLF RIVER, WISCONSIN,
MENOMINEE TERRITORY, November, 2, 1852.

SIR: In conformity with my report, dated at Powwa-ha-conna, the 16th ultimo, the Menominees commenced their emigration on the 19th ultimo, and I have now the honor to report that they have been removed by Messrs. Thompson and Ewing, in pursuance of their contract, to this place.

Lake Powwa-ha-conna, the place where the Indians embarked, is notable as being the location of a Catholic mission school. The mission is under the charge of the Rev. B. F. Bonduel, who, besides his duties as pastor, has a school in which Indian boys are taught. The girls are taught by Mrs. Dousman and her daughter, Miss Jane Dousman, both of whom have resided here several years. I have been exceedingly interested in these ladies. Amiable, intelligent, and accomplished, they are fitted for the very highest circles of society—in which they have evidently moved, but, with the meekness and humility of the true Christian, they prefer, to the cold and heartless ceremonies of fashionable life, the more pleasant and philanthropic duty of training up the rude children of the forest to intelligence and christianity. They illustrate, in their lives, some of the highest excellencies of female character, but especially that

- 398 true spirit of genuine Christian benevolence which has made woman, everywhere, and in all ages, the nearest link which binds humanity to the angelic world. Mr. Bonduel is a native of France and is highly educated. He sprang from a wealthy family, and inherited a fortune, which at the time he came to the United States, amounted to thirty or forty thousand dollars. Devoted, however, to the priesthood, for which he was educated, he chose rather to employ the energies of his fine intellect in the work of ameliorating the condition of savage life, than the less adventurous field of religious duty at home. He entered, therefore, very early in life into the field of missionary labor among the Indian tribes, and has now been engaged in this laborous work for nearly thirty years. He has resided among several tribes, but for some years has been exclusively among the Menominees, to whom he is attached alike by a sense of religious duty and the strong cords of sympathy. Under his cares and teaching a considerable portion—nearly one-third—of the tribe have become christianized, and a number of the younger members are rapidly advancing in education. Some of them read and write very well. It is highly interesting to see him in his humble chapel, with his little Christian flock around him, chaunting the hymns of the Catholic church in their native tongue. As he recites the solemn prayer which ages of Christian usage have consecrated, they look upon him with eyes filled Christian sympathy and beaming forth

with the most intense anxiety, and, with the most proper observance of time, they break forth in their responses with a voice as deep, rich, and mellow as the flute. Although an observer like myself may not understand a single word, yet he could not fail to see that the whole ceremony of worship is marked not only by Christian simplicity but by Christian purity of thought and intention.

399 In obedience to your instructions I have diligently superintended the removal, and am happy to certify that it has been effected in a peaceful, comfortable and satisfactory manner. They have been abundantly supplied with transportation and good and wholesome provisions. No complaint has been made to me, and no instance of discontent has been noticed by me. On the contrary, the Indians expressed their entire satisfaction in regard to their removal, and have this day, in council presented their thanks to the contractors for their kindness in providing to make their journey smooth and comfortable. They are now encamped on their new home, and appear to be highly satisfied with the territory selected for them.

In the course of the removal, it was found most convenient for those living on the Oconto and Menominee rivers to remove by the way of the Oconto river and Shawano lake, which empties into Wolf River eight miles below the falls at this place. The portage was only three miles. Mr. John Jacobs was selected by the contractors to supply and lead this band; and I detailed my son, Harvey L. Murray, to superintend the removal and devote himself to their comfort, and see that they lacked nothing which the contract provided for them. His report is herewith enclosed. I cannot omit saying that the selection of Mr. Jacobs to lead this band was most fortunate and judicious. He is a capable, discreet and energetic man, high in the confidence of the Menominees, and deservedly respected by all.

Very respectfully,

Your obedient servant,

(Signed) E. MURRAY,
Superintendent, etc.

Hon. L. Lea. Com. Ind. Aff's, Eashington, City.

400 *Letter from H. L. Murray, dated November 2, 1852, to E. Murray, Superintendent of Menominee Indians, Appearing on page 326 of said Document and being a part of the Report of the Commissioner of Indian Affairs, November 25, 1852.*

FALLS OF WOLF RIVER, WISCONSIN,
November 2, 1852.

SIR: In obedience to your instructions I repaired, on the 16th, to the Oconto river, to superintend the removal of that portion of the Menominees residing on the Oconto, and have faithfully attended to the duty assigned me of seeing the Indians well provided for by the contractors, and comfortably removed to this place.

The removal has been effected in a maner entirely satisfactory to

the Indians, and very credible to the contractors, who deputed Mr. John Jacobs to procure supplies and lead the band. Mr. Jacobs is well educated and highly esteemed. His provision for the band, and care over them, merit the highest praise, and command their warmest thanks and approbation.

The band, consisting of seven hundred, are all here, and comfortably encamped.

Respectfully yours,

(Signed) H. L. MURRAY.

E. Murray, Superintendent, &c.

- 401 *Extracts from Report of Commissioner of Indian Affairs to the Secretary of the Interior, dated November 30, 1852, Appearing on page 295, House Document No. 1.*

The removal of the Menominees, as contemplated by an act of Congress passed at the last session, has been satisfactorily effected. The whole tribe are now concentrated on the designated territory between the Wolf and Oconto rivers—a location — which they are well pleased, and where they are anxious to be permitted permanently to remain. Should this be assented to by the legislature of Wisconsin, the arrangements necessary to effect the object can be easily made on terms, it is believed, mutually advantageous to the Indians and to the government. The country where they are now located is well suited to their wants, and I know of none to which they could with propriety be removed, and where they would, at the same time, be so little in the way of our white population. Whenever they may be settled, it will be incumbent on Congress to make further provisions for them, as their claims appeal strongly to the justice and humanity of the government.

- 402 *Extract from Letter of September, 1853, Green Bay, Wisconsin, from John V. Snyder to Superintendent of Indian Affairs, Northern Superintendency, being a part of the Report of the Commissioner of Indian Affairs under date of November 26, 1853, and Appearing on page 291 of House Document No. 1.*

The Menominees were removed to their present territory in November of last year (1852). The short time they have resided on their lands, and the unfavorable circumstances attending their removal, render it impossible, in this report, to give any satisfactory information in regard to their advancement in agricultural knowledge and pursuits. Laboring under almost every form of discouragement and disappointment, they have been able to make slow progress in the acts of civilization, and they are now despairing of any improvement, unless the change in the head of the government shall bring with it a strict adherence to justice and the claims of humanity. Their annuity payment last year being delayed until November, that portion of the tribe which still follow the chase were

prevented, by the ice and snow, from moving their families to their hunting grounds; and the scanty supply of provisions furnished under the contract for their removal, together with the freezing up and consequent loss and detention of their provisions during removal of the agricultural bands, has been the cause of great suffering and destitution, among the whole nation, during the past winter and summer, from the effects of which they have not yet recovered, and on account of which they have hoped their annuities this year would

403 be paid earlier, so as to relieve their present distress, and enable them to return to their homes before the cold weather shall close the waters against them. Oshkosh, the head chief, said to me in August, when asking permission to go away, to gather rice, "you are aware I have no doubt, of our present situation of starvation; we have never been so poor and destitute of provisions as we are this year, after the solemn promise of the agents, of the government to us to affect our removal. It was well understood, when acceded to the provision, of the government, to remove, that we were to be supplied a whole year with provisions, but, as it happened, the provisions lasted only about six months, and even our three thousand dollars, of provisions of last year are gone". In this melancholy condition I find the Menominees at the present time.

The map accompanying this report exhibits the location of the different tribes within this sub-agency; the distance from each other and from Green Bay, the location of the agency building.

The Stockbridges are settled along and near the Shore of Winnebago Lake. The Oneidas occupy both sides of the stream called Duck Creek, which flows entirely through their country, from southwest to northeast.

The Menominee tract is divided nearly equally into two parts which are separated from north to south by Oconto River. These two divisions are very distinctly marked, that on — east being heavily timbered with pine and maple in about equal proportions, the pine being *being* of the very best quality for lumbering purposes, and the maple affording extensive facilities for manufacturing sugar, the land also being of the best quality for farming; while that portion on the west is a succession of dry sandy ridges, unfit for cultivation, and only thinly timbered with oak and spruce, with the exception of some narrow pine groves and sugar maple bottoms

404 bordering the Wolf River on the extreme west boundary of the tract. The only redeeming quality which this portion of the tract possesses is the numerous beautiful small lakes, or ponds, of clear pure water, which are to be found within sight of each other for many miles in extent. These lakes abound in fish, and afford great relief to the Indians centered about them. Unfortunately, I think for all concerned, the late superintendent selected this, the southwest corner, as the location for the farm shops, and school houses, and soil being too light and dry.

The labor expended on such a soil by new beginners would only result in disappointment. The fruits of this summer's toil have verified in many instances my opinion in this respect; and the forty acres fenced and planted in corn by the late superintendent,

as an experiment, will yield but little more than the seed. Already have several of the agricultural party expressed a desire to settle near the Oconto Falls where there is every facility for comfortable and prosperous farming operations.

The blacksmith shops are within two and one half miles of each other in the south west corner of the tract, while nearly one half of the Indians are living from 12 to 20 miles from that part, subjecting them to great inconvenience.

The shops and dwellings for the smiths are loosely and cheaply built, affording but poor protection against the severe winters of this climate.

The temporary buildings used for the schools and the dwelling of Mrs. Dousman, the female teacher and her daughter, are unfit for the purposes for which they are occupied, and it is hoped that better ones will soon be erected. •

There are two saw mills on the tract, their location being designated on the map. They are good mills, in good repair, and
405 owned and kept in operation by persons who squatted on the lands several years ago.

If these lands should be reeceeded to the Menominees, I would recommend that these mills be purchased at a fair valuation for their benefit, as provided in the treaty, as both of them can be bought, and grist mills erected in them, within the amount of the appropriation.

A large portion of the Menominees—nearly one half are now turning their attention to agriculture, and some of the young men are desirous of learning the blacksmith and carpenter trades; and all are becoming convinced that the cultivation of the soil for a livelihood must be their ultimate resort. Entertaining these feelings they have no desire to move again. They are satisfied with the location made for them, and hope that the government will confirm it to them forever.

Having been broken up by their recent removal, the agricultural bands are nearly destitute of everything necessary to carry on their operations. Having no provender during the last winter, their cattle have nearly or quite all disappeared. This summer they have, under my direction, cured an abundance of hay, to keep whatever amount of cattle may be given them this fall. They are temperate and industrious; and many of them who selected patches of bottom land have raised very good crops of corn, potatoes, and garden vegetables. They are very much opposed to the introduction of spirituous liquors within their territory either by their own people or by the whites; and I have made it my special duty to provide against it with all the means in my power.

I would call the attention of the department to the situation of the agency property at this place. The buildings not
406 having been occupied for several years past are falling to decay and becoming worthless. To repair them and rebuild the fences will require an outlay of at least one hundred and fifty dollars. This is, however, not needed as I am occupying my own dwelling.

I suggest it for the purpose of preventing the house and grounds from going entirely to ruin.

The blacksmiths, so far as I have been able to ascertain from the Indians themselves, have performed their duties satisfactorily, so far as doing their work is concerned.

All of which is very respectfully submitted,

JOHN V. SUYDAM,
Sub-Agent, Green Bay.

Hon. Fr. Huebschmann, Superintendent of Indian Affairs, Northern Superintendency.

407 *Extract from Report of Commissioner of Indian Affairs to the Secretary of the Interior dated November 25th, 1854, Appearing on page 211 of Volume 2 of the Bound Reports of the Commissioner of Indian Affairs.*

By the convention with the Menominees of the 12th of May last, (1854), they relinquished their right to a large tract of country in Minnesota, west of the Mississippi River, set apart for their permanent home, by the treaty of 1848, but which, proving to be unsuitable for that purpose, was therefore unacceptable to them. In exchange therefore, they were confirmed in the possession of a portion of the tract on the Wolf and Oconto Rivers, in Wisconsin, which, with the assent of the authorities of that State, had been assigned for their use, and to which they had removed. The tract granted them by the treaty of 1848, was guaranteed to contain not less than six hundred thousand acres; that secured to them by the convention of May last, (1854) embraces only two hundred and seventy-six thousand four hundred and eighty acres, and is deemed to be more than ample for their comfortable accommodation. The lands retroceded by them, though not suitable for their purposes, will be equally valuable to the Government, if not more so than those granted in exchange.

In consideration of the great difference in the quantities of the lands thus exchanged, and because it was believed that the consideration stipulated for the lands they had been induced to cede by the treaty of 1848 was inadequate, in addition to the pecuniary and other beneficial provisions of that treaty which were continued to them, the sum of one hundred and fifty thousand dollars was stipulated to be paid in fifteen annual installments, commencing with
408 the year 1867, when the payments in fulfillment of the treaty of 1848 will expire. This consideration was increased by the Senate, in the additional sum of ninety-two thousand six hundred and eighty-six dollars; making the aggregate amount of two hundred and forty-two thousand six hundred and eighty-six dollars. Having thus been permanently and most liberally provided for, and all causes of discontent removed, it is hoped and believed that in a few years the Menominees will exhibit some evidences of moral and social advancement.

409 Defendant offered in evidence joint resolution of the Wisconsin legislature of Feb'y 1st, 1853, General Wisconsin laws of 1853, as follows:

Complainant objected as incompetent, irrelevant and immaterial, ineffective and void, but not as to the form in which it is offered.

Joint Resolution Concerning the Menominee Tribe of Indians.

Resolved by the Senate and assembly of the State of Wisconsin, That the assent of the State of Wisconsin is hereby given to the Menominee nation of Indians to remain on the tract of land set apart for them by the President of the United States, on the Wolf and Oconto Rivers, and upon which they now reside, the same being within the State of Wisconsin aforesaid, and described as follows, to wit:

Commencing at the southeast corner of town 28 north range 19, running thence west thirty miles, thence north eighteen miles, thence east thirty miles, thence south eighteen miles, to the place of beginning.

Approved February 1, 1853."

* * * * *

410 Subsequently and before the fifteenth of July, 1916, the defendant filed with the Commissioner and made a part of the record in the case, the following stipulation and original affidavit of A. S. Nicholson:

(Pages 223, 224 and 225).

411 In the Supreme Court of the United States.

In Equity. Original. No. 9.

THE STATE OF WISCONSIN, Complainant,

v.

FRANKLIN K. LANE, Secretary of the Interior Department.

Stipulation.

It is stipulated and agreed by and between the attorneys for the plaintiff and the defendant in the above entitled action that the record may show that the following proceedings were had before the Commissioner appointed by the Supreme Court of the United States to take testimony herein and that each party waived appearance of the other and the notice agreed to be given of the taking of testimony by the defendant on or before July 15, 1916.

The defendant offers in evidence as Defts. Exhibit J, certified copy of the field notes of the survey of the line between sections 20 and 21, T 28 N., R., 16 E., 4th P. M. Wisconsin.

And it is stipulated and agreed by and between the attorneys for the plaintiff and defendant that the same may be received with the same force and effect as if it were the original field notes and the plaintiff objects to the introduction thereof as incompetent, irrelevant and immaterial.

And it is further stipulated and agreed that if there are any errors in the certified copy, the plaintiff may have the right to correct the same, and that plaintiff may offer, if desired, certified copies of any other part of the field notes of the surveys of the Menominee

412 Reservation subject to any objection the defendant may make at the time of the introduction of the same, except that the same may be received with the same force and effect as if the certified copies to be offered by the plaintiff were the original field notes.

It is further stipulated and agreed that the affidavit of A. S. Nicholson, Superintendent of the Keshena Indian School, who has jurisdiction over the Menominee Indians, in regard to the search of the records of the Keshena Agency may be received in evidence with the same force and effect as though he had been personally called and testified to the facts stated in said affidavit, subject however, *the* the objections that such testimony is incompetent, irrelevant and immaterial.

And it is further stipulated and agreed that the plaintiff may offer in evidence further testimony on this subject in rebuttal.

WALTER C. OWEN,

Attorney General of Wisconsin;

M. G. EBERLEIN,

R. A. HOLLISTER,

J. C. THOMPSON,

Attorneys for Plaintiff;

ALEXANDER T. VOGELSANG,

Solicitor;

C. EDWARD WRIGHT,

Assistant Attorney;

VILLARD MARTIN,

Assistant Attorney,

Attorneys for Defendant.

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'Affidavit.

STATE OF WISCONSIN,

County of Shawano, ss:

A. S. Nicholson, being first duly sworn upon oath deposes and says that he is the superintendent of the Keshena Indian School and has jurisdiction over the Menominee Indians; that he has the custody of all the records pertaining to the affairs of the Menominee Indians on file at the Keshena, formerly Green Bay Indian Agency, which are all the official records in the State of Wisconsin pertaining to the affairs of the Menominee Indians; that affiant had personally examined and caused to be examined by employees in his office all of

said records, particularly between October 18, 1848, and October 18, 1850, with a view of ascertaining whether the Indians were ever notified to remove from the lands ceded by them by treaty of October 18th, 1848, or were ever notified that said lands were wanted, in accordance with article 8 of said treaty, and that said search has been carefully and conscientiously made and no record or any tract of any record whatever has been found of any such notification, and that said records wholly fail to reveal that any such notification was ever given.

Dated at Neopit, Wisconsin, this 8th day of July, 1916.

A. S. NICHOLSON.

Subscribed and sworn to before me this 8th day of July, 1916.

[SEAL.]

MINNIE E. CLARK,
Notary Public,
Kewaunee County, Wis.

My commission expires October 19, 1919.

414 Subsequently counsel for the *complaint* filed with the Commissioner the following stipulation and offers of testimony, pages 227, 228, 229, 230, 231, and 232.

415 In the Supreme Court of the United States.

In Equity.

STATE OF WISCONSIN, Plaintiff,

vs.

FRANKLIN K. LANE, Sec'y of the Interior, Defendant,

It is stipulated and agreed, By the parties hereto by their respective attorneys that the following records and extracts of records and of copies of records may be offered, and received in evidence in the above entitled suit before the Hon. W. C. Kimball, Commissioner, to take testimony, with the same force and effect as if the original documents, papers and reports were themselves produced and offered and with an objection to be entered thereto in behalf of the defendant on the ground that the same are incompetent, irrelevant and immaterial, no objection being made to their not being originals, however, and the same upon being filed with said Commissioner, to stand and be received in evidence the same as if the originals had been offered and as offered by the Complainant, viz:

Extract from the Report of Wm. H. Bruce, Sub-Indian Agent at the Green Bay Sub-Indian Agency, to Hon. Orlando Brown, Commissioner of Indian Affairs, dated October 27th, 1849, Vol. I, Reports of the Commissioner of Indian Affairs, Pages 1161-1162.

"The third and last tribe of Indians, within the care and direction of this sub-agency is the Menominees, by far the most numerous. I have just returned from making to them an annuity payment, and also the moneys stipulated to be paid to them by the treaty of October 18th, 1848. The census taken by me numbers them about 2,117 souls.

* * * * *

416 "I found designing men holding constant intercourse with the Indians, using all their power to counteract every movement adverse to their individual schemes, and to prolong their stay in the country as long as possible.

The report of Col. Childs, conductor of the exploring expedition (article 6 of the late treaty), which I have the honor *for* forward herewith is a further statement of the troubles and obstacles we have hitherto encountered with this tribe of Indians. * * *

"In the discharge of the arduous duties, I found great relief in the advise and protection of Cap't Maurice Malone of the United States Army, and the presence of the Military force under his immediate command was of essential service. The articles purchased by Col. Childs for the exploring expedition are on hand, well stored and ready for use when the time shall come for the delegation to start.

As soon as the buds put forth in the Spring, they have pledged themselves to be ready with their exploring delegation; they also requested that the number composing it might be increased, and that Captain Malone and myself would accompany them, as they feared they might meet with trouble; and at the same time they conveyed to me the idea that they wished to make as *an* imposing an appearance as possible among their red brethren.

Extracts from the Report of Hon. L. Lea, Commissioner of Indian Affairs, Dated November 27th, 1850, to the Secretary of the Interior. Reports of the Commissioner of Indian Affairs, Vol. 1—35. From page 38.

"It was expected that the Menominees for whom a location has been provided between the Winnebagoes and Chippewas would be removed this year; but before the exploitation of their new
417 country by a party of these Indians had been completed, the season was too far advanced for the Tribe to emigrate before the approach of winter. The President therefore, in a just spirit of humanity gave them permission to remain in Wisconsin until the first day of June next."

Extracts from the Report of Alex. Ramsey, Minnesota Superintendent to Hon. Luke Lea, Commissioner of Indian Affairs, Dated October 21st, 1850—Vol. 1, Reports of the Commissioner of Indian Affairs, page 75, from page 75 and 76.

"The Menominees (Wild race) Indians have not yet removed to their lands in this territory, although the term of their stay in Wisconsin, under the treaty of 1846, expired during the present month.

Under the charge of Col. Bruce, their Agent, and Mr. Childs, a party of the Chiefs of this people, in the months of June and July last, made an exploration of the Country, provided for them by the treaty situated North of Crow Wing River and after a most minute examination, the gentlemen who accompanied the delegation, upon their return expressed to me in glowing terms their favorable opinion of the country and firm conviction that in the Lakes, the Rivers the Prairies and the Forests of that region, means of subsistence sufficient for the wants of the tribe could easily be found."

Extracts from the Report of Hon. L. Lea, Commissioner of Indian Affairs to the Secretary of the Interior, Dated November 27th, 1851, Vol. 1, Report of the Commissioner of Indian Affairs, page 265, from page 266.

"By permission of the President, the Menominees still remain on the lands in Wisconsin ceded by them under the provisions of their treaty of 1848 with the United States. In that treaty
418 it was stipulated that they were permitted to remain two years from the date thereof, and until they were notified by the President that the lands were wanted by the Government. * * *

"The fall of last year was the period fixed upon for their removal; but owing to their urgent appeals, and those of many of the whites in their immediate vicinity, and in consideration of their peaceful habits, the President granted them permission to remain until the first of June of the present year. At the expiration of this last named period, it being known that they had made no arrangements, and were in no condition to emigrate, the President again, at their earnest solicitation consented that they might remain a twelfth month longer on condition however that they should not interfere with the public surveys, and with the distinct understanding that this extension of time was to be considered as act of favor, they being still subject to removal at his discretion, and of this, Superintendent Murray was instructed to take care that they should be fully advised. * * *

Extracts from report of Elias Murray, Superintendent of Indian Affairs, dated at Green Bay, Sept. 30th, 1851, to Commissioner of Indian Affairs—Vol. 1, of Reports of Commissioner of Indian Affairs, page 308.

"I have the honor to report that I have this day returned from exploring the country on the Wolf and Oconto rivers." * * *

At the special request of the chiefs, I took three of them, to wit, Nahotte, Wau-Ke-Chi-On, and Osh-Ke-Nash-New with me.

419 As there were no roads, I also was obliged to hire a boat, and its owner and four men to row. One man with a light canoe to hunt, and a man to cook.

Extract from a letter to Hon. George W. Manypenny, Commissioner of Indian Affairs, by Francis Huebschmann, Superintendent of Northern Superintendency, dated at Milwaukee, Sept. 26th, 1853, and contained on page 290-*h*. Doc. 1 of Vol. 2 of reports of the Commissioner of Indian Affairs.

By the treaty with the Menominees made in 1848 the removal west of the Mississippi was contemplated, but from representations made to the Department, it was thought preferable to concentrate them on the upper Wolf and Oconto rivers in this State, and accordingly they were removed there in November of last year, and the consent of the legislature of Wisconsin to that arrangement was obtained. It was believed that their new location was better suited to their wants and that they could be removed to none where they would be so little in the way of our white population. If they should be permitted to remain there, further legislation on the part of Congress will be necessary to provide for their educational and agricultural improvement. For the erection of a grist mill and saw mill and manual labor school, and the employment of other means of education.

It is represented that the Menominees are now more than ever before, inclined to acquire agricultural habits and it is anticipated that proper efforts to improve their condition by educating the rising generation, will be rewarded by beneficial results. I shall shortly visit them and will then have an opportunity to judge better of the propriety of their location and the means requisite for their improvement.

420 It would be desirable that the question of their permanent location should be settled as soon as practicable, as uncertainty retards their progress and is a great detriment to the tribe."

Extract from Report of George W. Manypenny, Commissioner of Indian Affairs, to Hon. R. McClelland, Secretary of the Interior, of date November 26th, 1853, contained in page 244-h, Doc. 1, of Vol. 2, of Reports of the Commissioner of Indian Affairs.

"In 1848, the Menominees ceded their entire county in Wisconsin and agreed to remove to another, stipulated to be given them in Minnesota, west of the Mississippi. From this obligation they were exempted by the late President of the United States, on the ground of the unsuitability of the new country intended for them; and with the approbation of the proper authorities of Wisconsin, they were assigned and removed to a remote portion of the Extensive tract which they had ceded, embracing about three hundred and forty-five thousand six hundred acres. The information in possession of the Department leads to the conclusion that this location is in many respects suitable for them; and that they can probably remain there for many years without interference with the advancement on interests of the white population. If, however, this arrangement is to be made of a permanent character a new convention with them will be necessary for their relinquishment of the country given to them by the treaty of 1848, and that the various beneficial provisions of that treaty may by made operative and applicable to them where they are."

Further Stipulated by and between the parties hereto that the record in the above entitled action may show that the above and foregoing records, parts of records and extracts from records, 421 were offered in evidence as Complainant's exhibits, defendant objecting to the competency, relevancy, and materiality thereof, and that the same shall be received with the same force and effect as if they were, the original records themselves, and each party waives the appearance of the other at the offering of the same, and at the filing of this stipulation, and waives any and all notice of the filing and offering in evidence of the same and all notice of the offering and filing of the same is hereby waived.

Dated this 2d day of August A. D. 1916.

WALTER C. OWEN,

Attorney General of Wisconsin, and

MICHAEL G. EBERLEIN AND

R. A. HOLLISTER AND

J. C. THOMPSON,

Attorneys for Complainant.

ALEXANDER T. VOGELSANG,

Solicitor;

C. EDWARD WRIGHT,

Assistant Attorney;

VILLARD MARTIN,

Assistant Attorney,

Attorneys for Defendant.

422 Supreme Court of the United States, October Term, 1915.

No. 9, Original.

THE STATE OF WISCONSIN, Complainant,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

To the Honorable the Supreme Court of the United States:

The undersigned Commissioner appointed by an order entered in this cause on the 20th day of December, 1915, to take and return such evidence as the parties to said cause shall produce, respectfully reports to the Court that pursuant to the said order he opened the Commission conferred on him in the Circuit Court Room in the City of Shawano, State of Wisconsin, on the 24th day of March, 1916, at 10 o'clock A. M. and, the counsel for the respective parties being present, proceeded to execute the said Commission on that day and on the 25th, 27th, and 30th of the same month, and on the 22d and 23d of June 1916. That on the 1st day of September 1916, the parties not offering any more testimony the Commission was closed.

The said Commission was executed by receiving the testimony of the several witnesses named in the testimony, who were sworn to testify to the truth, the whole truth and nothing but the truth before giving their evidence, and the testimony so given by them was taken down by myself, a typewritten copy of which is herewith submitted, together with the exhibits offered in evidence.

423 Said testimony and exhibits have been deposited with the Clerk of this Honorable Court.

Respectfully submitted.

WM. C. KIMBALL, *Commissioner.*

Dated Sept. 20th, 1916.

424 In the Supreme Court of the United States, October Term, 1915. No. 9, Original.

THE STATE OF WISCONSIN, Complainant,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

To the Honorable the Supreme Court of the United States:

Pursuant to the order of this Honorable Court entered on the 20th day of December, 1915, appointed the undersigned as Commissioner to take and return testimony in the above entitled cause and directing a statement of actual expenses incurred in the taking of said testimony to be submitted, I beg leave to state that it became necessary to travel to the Cities of Shawano, Oshkosh, and Madison in the

State of Wisconsin, and to the City of Washington in the District of Columbia, and the expenses of the Commissioner were as follows:

Compensation and Expenses of Commissioner.

Per diem:		
1916.	March 24th and 25th at Shawano.....	\$20.00
	March 27th at Oshkosh.....	10.00
	March 30th at Madison, Wis.....	10.00
	June 20th and 21st en route to Washington.....	20.00
	June 22d and 23d at Washington.....	20.00
	June 24th and 26th en route to Oshkosh.....	20.00
		<hr/>
		\$100.00
425 Expenses:		
March 23d.	Railroad fare Oshkosh to Shawano.....	\$1.35
	Supper at Appleton Junction.....	.50
March 25th.	Hotel at Shawano.....	3.00
	Railroad fare Shawano to Oshkosh.....	1.35
	Dinner at Clintonville.....	.50
		<hr/>
		\$6.70
March 29th.	Railroad fare to Madison.....	\$2.15
	Meal at Fond du Lac.....	.50
March 30th.	Hotel bill at Madison.....	3.00
	Railroad fare Madison to Oshkosh.....	2.15
	Meal at Jefferson Junction.....	.50
		<hr/>
		\$8.30
June 16th.	Express on exhibits to Washington.....	\$4.00
June 20th.	Railroad fare Oshkosh to Washington.....	21.95
	Parlor car Oshkosh to Chicago.....	.75
	Lunch en route to Chicago.....	1.25
	Dinner at Chicago.....	1.25
	Sleeping car Chicago to Pittsburgh.....	2.00
		<hr/>
		\$27.20
June 21st.	Parlor Pittsburgh to Washington.....	\$2.00
	Breakfast on train.....	1.00
	Lunch on train.....	1.25
	Buss at Washington.....	.70
	Dinner at Washington.....	1.00
		<hr/>
		\$5.95
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June 22d.	Meals at Washington.....	\$2.30

June 23d.	Meals at Washington.....	2.35
	Hotel bill two days.....	8.00
	Railroad fare Washington to Oshkosh.....	21.95
	Sleeping car to Pittsburgh.....	2.00
		<hr/>
		\$34.30
June 24th.	Parlor Pittsburgh to Chicago.....	\$2.00
	Meals on train.....	3.05
	Buss at Chicago.....	.50
		<hr/>
		\$5.55
June 26th.	Hotel at Chicago.....	\$2.00
	Buss at Chicago.....	.60
	Breakfast .....	.80
	Dinner on train.....	1.10
		<hr/>
		\$4.50
Total expenses		\$95.20
Copy of testimony taken.....		\$43.50
Total due Commissioner.....		\$238.70

Respectfully submitted,

WM. C. KIMBALL, *Commissioner.*

Sept. 20, 1916.

427 Supreme Court of the United States, October Term, 1915.

No. 9, Original.

THE STATE OF WISCONSIN, Complainant,

vs.

FRANKLIN K. LANE, Secretary of the Interior, Defendant.

To the Honorable the Supreme Court of the United States:

Pursuant to the order of this Honorable Court entered on the 20th day of December, 1915, in the above entitled suit, appointing the undersigned as Commissioner to take and return the testimony in the above entitled cause, I beg leave to herewith return the following exhibits offered and received in evidence at the taking of the testimony in the above entitled suit, viz:

Complainant's Exhibit	1	Notice to produce, enclosed herewith.
"	" 2	Original Contract between Oconto Company and The United States Not enclosed herewith, but read into the record at page 88.
"	" 3	Statement signed by Dewey George enclosed herewith.
"	" 4	Subpoenas duces tecum, enclosed herewith.
"	" 5	Patent to Della Humphrey and H. C. Hayter, herewith enclosed.
"	" 6	Letter from State Treasurer herewith enclosed.
"	" 7 to 34	Tax receipts for taxes paid by Hayter and Humphrey, herewith enclosed.
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Complainant's Exhibit	35 to 40	Being Original receipts from the State for payments on Humphrey and Hayter land, herewith enclosed.
"	" 41	Photographic Copy of Silas Chapman original withdrawn by Mr. Nicholson, Indian Agent, and copy herewith furnished by Complainant's Attorneys.
"	" 42 to 49	Being abstracts of title enclosed herewith.
"	" 50	Hollister Amos Contract not enclosed herewith but read into the record at page 90.
"	" 51	Land contract to Paine Lumber Co. not enclosed but read into the record at page 97.
"	" 52	Certified copy of order, authorizing issue of subpoena, herewith enclosed <i>enclosed</i> .
"	" 53	Certified copy of pleadings in Sherry vs. Gould, enclosed herewith.
"	" 54	Deed from Smith and wife to Hollister-Amos Co. not enclosed but read into the record at page 116.
"	" 55	Deed from Cameron and Sherry to Hollister—not enclosed, but read into the record at page 115.

429	"	"	55 to 66	Township plats enclosed herewith.
	Complainant's Exhibit	67		Blue print of map, enclosed herewith.
	"	"	68 and 69	Being maps enclosed herewith.
	"	"	70	Letter of Commissioner George, not enclosed herewith but read into the record at page 119.
	"	"	71	Not enclosed, but read into the record, being part of the records in the land department of the State of Wisconsin—certified copy filed as Complainant's Exhibit 112.
	"	"	72	Original offered from records of State of Wisconsin, and certified copy offered as Complainant's Exhibit 113. Original not herewith enclosed.
	"	"	73	Original record of patents in State land office of Wisconsin offered, and certified copy appears as Complainant's Exhibit 114.
	"	"	74	Abstract of title herewith enclosed.
	"	"	75	Record of Patent in State land Office, original not enclosed.
	"	"	76	Original not enclosed, but read into the record at page 150.
	"	"	77	Original not enclosed, being a memorial read into the record at page 115.
	"	"	78	Railroad map of Wisconsin, herewith enclosed.
	"	"	79 to 111	Certified copies of letters and papers and map herewith enclosed.
	"	"	112	Certified photographic copy of Exhibit 71, and herewith enclosed.
430	Complainant's Exhibit	113		Certified copy of Exhibit No. 72, herewith enclosed.
	"	"	114	Certified copy of Patent, the original of which was Exhibit 73, and the certified copy herewith enclosed.

"	"	115	Certified copies of dates of sale and numbers of certificates, copies enclosed.
"	"	116 to 129	Being copies of letters and offered pursuant to written stipulation, are in the volume of testimony.
Defendant's Exhibit		1	Platted survey, enclosed herewith.
"	"	2	Prints of butts of logs, herewith enclosed.
"	"	3	Certified copy, containing ten pages embracing contours map and estimates herewith enclosed.
"	"	4, 5 and 6	Annual reports of the Commissioner of Public Lands of Wisconsin, herewith enclosed.
"	"	A	Not herewith enclosed, but read into record at page 190.
"	"	B	Not herewith enclosed, but read into record at page 194.
"	"	C	Herewith enclosed, being statements concerning surveys.
"	"	D	Letters herewith enclosed.
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Defendant's Exhibit		J to I	Certified copy of field notes herewith enclosed.

The above and foregoing exhibits were all, offered in evidence by the Respective parties, and the objections thereto are noted in Volume of testimony. The said volume of testimony returned herewith is paged by me at the bottom of each page, and it is this paging that is referred to in this certificate.

Respectfully submitted,

WM. C. KIMBALL, *Commissioner.*

September 20th, 1916.

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P. Ex. No. 3.

UNITED STATES INDIAN SERVICE,
GREEN BAY AGENCY,
KESHENA, WISCONSIN, April, 13, 1900.

Hollister Amos & Co., to the United States, Dr.

To banking logs on school section:

1,410,000 feet pine logs, @ \$5.50 M.....	\$7,755.50
351,400 feet cedar logs @ \$5.50 M.....	1,932.70

Total amount	\$9,687.70
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D. H. GEORGE,
U. S. Indian Agent.

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P. Ex. No. 5.

No. 11778.

THE STATE OF WISCONSIN,
Sixteenth Section:

To Whom These Presents Shall Come, Greeting:

Whereas, by an act of the Congress of the United States, approved August 6th, A. D. 1846, entitled, "An Act to enable the people of Wisconsin Territory to form a constitution and State Government and for the Admission of such State into the Union," the sections numbered sixteen in every *township* of the public lands of this State were granted to the said State of Wisconsin for the use of schools; and whereas, by the Constitution of this State and such sixteenth sections were accepted for such use; and whereas, it appears by the records, now in the office of the Commissioners of the Public Lands that full payment was made by Della G. Humphrey and H. C. Hayter on the 18th day of March, A. D. 1901, according to the provisions of law, for the following described tract of land, a part of the lands so granted, to wit: The north east quarter, the west half of the north west quarter the north west quarter of the southwest quarter, the south half of the south west quarter the north half of the southeast quarter and the south east quarter of the south east quarter of section number sixteen (16), in township no. twenty-nine (29), north of range No. fourteen (14), east containing four hundred eighty (480), acres more or less, according to government survey, and situated in the County of Shawano, and State of Wisconsin, according to the official plats of the survey of the said lands now in the office of the Commissioners of the Public Lands, as provided by law.

Now, know ye, that the State of Wisconsin, in consideration of the premises, and in conformity with law in such case made and provided, has bargained, sold, granted and conveyed, and by these presents does bargain, sell, grant and convey, unto the

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said Della G. Humphrey and H. C. Hayter and to their heirs and assigns, the said tract, of land above described:

To have and to hold the same together with all the rights, privileges, immunities, and appurtenances of whatsoever nature there unto belonging, unto the said Della G. Humphrey and H. C. Hayter and to their heirs and assigns, for ever.

[Seal of the State of Wisconsin.]

In testimony whereof, We, Wm. H. Froehlich, Secretary of State; J. O. Davidson, State Treasurer, and E. R. Hicks, Attorney General, Commissioners of the Public Lands of the State of Wisconsin, have caused these letters to be made patent, and our official seal to be hereunto affixed.

Given under our hands, at the Capitol in the City of Madison this, 20th day of March, in the year of our Lord, one thousand nine hundred and one.

WM. H. FROEHLICH,
Secretary of State;

J. O. DAVIDSON,
State Treasurer;

E. R. HICKS,
*Attorney General,
Commissioners of the Public Lands.*

(Endorsed:) #5 No. 54092. (Sixteenth Section lands). Patent, No. 11778, N. E. $\frac{1}{4}$ W $\frac{1}{2}$ N. W. N. W. S. W. S. $\frac{1}{2}$, S. W. N. $\frac{1}{2}$, S. E. and SE. SE. Section Sixteen Town 29, range 14, E. Shawano County. The State of Wisconsin, to Della G. Humphrey and H. C. Hayter. Office of Register of Deeds, Shawano, County Wis.
435 Recorded April 9th, 1901, at 4 o'clock P. M. on page 573 volume 36, of Deeds.

W. E. WILSON, *Register.*

Bank.
Pd.

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P. Ex. No. 6.

WISCONSIN STATE TREASURY,
MADISON, Dec. 1, 1887.

Henry Hughes, Esq., Shawano, Wisconsin.

D'R SIR: Yours of Nov. 15th was submitted to the Att'y Gen'l; who to-day notified me that he has notified Indian Agent Jennings that the State will not permit any pine to be removed from Sec. 16, by the Indians or any one for them.

Keep watch of the matter and if any trespasses are made on the land advise me and we will at once commence legal proceedings to stop the same.

Yours,

H. B. HARSHAW,
State Treasurer.

Enclosures.

August 27, 1849.

Bruce, Esq., Wm. H., Green Bay, Wisconsin.

SIR: Your several communications of recent date, respecting the state of affairs in the Menomonee country, and in relation to questions growing out of the execution of the late treaty with those Indians, have been received by the hands of Col. Childs: who has been fully conferred with on the subjects to which you call the attention of the Department.

The difficulties which have arisen, are much to be regretted, as they may have an untoward influence upon the interests & welfare of the Indians, which are so nearly connected with their early removal & quick settlement in their new country; but the conduct of the Menomonees in refusing to send off the delegation to explore that country as provided in the treaty, with the view of fixing upon a proper location for the tribe, has caused no little astonishment; and will excite much regret, if not displeasure, in the mind of their Great Father, the President, now absent from the city for a short time, when he hears of it. It can only be attributed to improper influence exercised over them by designing white men, for purposes of their own, and which are opposed to the interests & welfare of the Menomonees, or to a disposition on their part, to practice deception & bad faith towards the government; or to their being no better than children, who know not what is best for them, & are disposed to act wilfully without regard to consequences. That people so well informed as the Menomonees generally are, and who so well know the evils they have already suffered from remaining in their present position, & the importance of ridding themselves of them, by making early arrangements to settle comfortably in their new home west of the Mississippi, would act as they have done, is indeed a matter of surprise as well as regret.

Their complaints are unreasonable and unfounded, the printed copy of their late treaty sent to them through you, is the same, word for word, as that which they signed, & yet they foolishly and without any specification or explanation undertake to question it; the moneys to which they were first entitled under that instrument were sent to them as soon as the proper and necessary arrangements therefor could be made, & it could be done, but without any well grounded reason they complain of delay; & they undertake with as little cause to find fault because the amount stipulated for the individual improvements on the lands ceded has not been sent. The treaty stipulates no time

for the payment of this sum, & in fact they are not of right
438 entitled to it until they *they* remove & abandon the improvements: nor could it be sent with propriety until the improvements had been valued & the valuations sent on to the Department, so that it could see the result, & whether it had been properly made, & was correct, and give any instructions that might be necessary in relation to the payment of the money.

Their objections to do what the government desires them—and that only for their own good, which is its first and chief object—are

alike frivolous & unreasonable; but they appear determined not to be satisfied & to make difficulties without cause, so that it seems almost useless to attempt to please them. They must be given clearly to understand, that the government will not be trifled with and treated with disrespect; & that they must, in good faith, prepare themselves to comply honorably with their treaty obligations, or they will be compelled to do so; & not only this but that not another dollar of money will be paid to them while they remain where they are, & behave as they have done, beyond the \$30,000 under the first clause of the 4th Article of the treaty; & that would be withheld so long as they did not manifest a proper spirit of compliance with their obligations, if that instrument did not require it to be paid as soon as convenient after being appropriated by Congress. If therefore they wish to receive their moneys next year, & not to be compelled to remove by military force, without getting them, immediately after the expiration of the two years stipulated in the treaty for them to remain where they are, they will at once change their conduct, listen to the advice of the Agents of the government, & without delay, & in good faith, send off the exploring party to examine their new country. If they will do this, the Department is willing to gratify them by paying the improvement money at once, and in the hope that they will, it will immediately be remitted to you. Though the amount of the schedule furnished by you does not quite equal the sum set apart by the treaty towards the object, the whole will be sent, in order that you may have the means of rectifying any accidental errors, if any, which may have been committed in preparing the schedule. And this document is herewith returned lest you may not have retained a copy of it.

In regard to the payment of the \$30,000, I have to remark with regret, that the formal appointment by you, or through your instrumentality of persons to act as commissioners to examine into the debts of the Indians, cannot be recognized or sanctioned. The Department has nothing to do with any debts owed by them: they, or at least the chiefs, into whose hands the money is payable by the government, doubtless know what they justly owe as national debts, and the latter are competent to make a proper disposition of the money, unless swayed by improper influence; and what the Department sought in its instructions on this subject, was that you and Mr. Wistar, the Commissioner for distributing the fund for the mixed
439 bloods, should exert yourselves to counteract as far as possible any such influence, and to render them any *any* incidental advice & assistance in your power, as to the disposal of the fund with reference to the objects to which it was intended to be applied. Its application was to be determined by themselves. The payment of the money to them, as is specifically required by the treaty, absolves the government from all further responsibility or duty in relation to it, except to do what was desired of Mr. Wistar & yourself. You are therefore instructed to adopt this course; and it is hoped that you will have the assistance of the Military, for which application has been made, as you will perceive from the accompany-

ing copy of a letter of this date to the Secretary of War, in time to aid you to preserve peace, & prevent the Indians from being improperly interfered with.

You will perceive from the above mentioned letter what is to be your relations towards the military, & the general object to which you are to direct your joint attention.

The question of the power to remove intruders from the lands occupied by the Indians, and to restrain others from going there, is one of great delicacy, & involving important considerations. It will be fully considered, & instructions on the subject given to you with as little delay as practicable, so that you may receive them by the time the Military reaches the country.

The conduct of Chas. Corrow or Corron requires no action as he has been arrested & the case is in the hands of the judicial authority of the State.

Your nomination of Wm. Powell as interpreter in place of Chas. A. Grignon is approved.

O. B.

OFFICE INDIAN AFFAIRS,

August 27, 1849.

Campbell Esq T I. Clerk House of Reps.

SIR: This office is very desirous of obtaining a few copies of House Document 76, Second Session 29th Congress, containing the report of Messrs. Butler & Lewis, Comms. &c "relative to the Indians of Texas and the Southwestern prairies," but know not how to accomplish the object, unless through your courtesy and kindness. If in your power to furnish a few copies, your doing so will be regarded as a particular favor.

O. B.

440

D. I. O. I. A.

August 27th, 1849.

SIR: Your several communications of recent date, respecting the state of affairs in the Menomonie Country and in relation to questions growing out of the execution of the late treaty with those Indians, have been received by the hands of Col Childs; who has been fully conferred with on the subject to which you call the attention of the Department.

The difficulties which have arisen are much to be regretted, as they may have an untoward influence upon the interests and welfare of the Indians, which are so nearly connected with their early removal and quiet settlement in this new country; but the conduct of the Menomonies in refusing to send off the delegation to explore that country, as provided in the treaty, with the view of fixing upon a proper location for the tribe has caused no little astonishment, and will excite much regret, if not displeasure in the mind of their Great Father, the President, now absent from this city for a short time, when he hears of it, can only be attributed to improper influence exercised over them by designing white men, for purposes of their own,

and which are opposed to the interests and welfare of the Menomones, or to a disposition on their part to practice deception and bad faith towards the government, or to their being no better than children who know not what is best for them, and are disposed to act wilfully without regard to consequences. That people so well informed as the Menomones generally are, and who do so well know the evils they have already suffered from remaining in their present position, and the importance of ridding themselves
441 of them by making early arrangements to settle comfortably in their new home west of the Mississippi would act as they have done, is indeed a matter of surprise as well as regret.

Their complaints are unreasonable and unfounded: the printed copy of their late treaty sent to them through you, is the same, word for word, as that which they signed, and yet they foolishly and without any specification or explanation undertake to question it; the moneys to which they were first entitled under that instrument were sent to them as soon as the proper and *and* necessary arrangements therefor could be made, and it could be done, but without any well grounded reason they complain of delay; and they undertake with as little cause to find fault because the amount stipulated for the individual improvements on the lands ceded has not been sent. The treaty stipulates no time for the payment of this sum, and in fact they are not of right entitled to it until they remove and abandon the improvements; nor could it be sent with propriety until the improvements had been valued and the valuations sent on to the Department so that it could see the result, and whether it had been properly worded and was correct, and give any instructions that might be necessary in relation to the payment of *of* the money.

Their objections to do what the government desires them and that only for their own good which is its first and chief object are alike frivolous and unreasonable, but they appear determined not to be satisfied and to make difficulties without cause, so that it seems almost
442 useless to attempt to please them. They must be given clearly to understand, that the government will not be trifled with and treated with disrespect, and that they must, in good faith prepare themselves to comply honorably with their treaty obligations, or they will be compelled to do so, and not only this but that not another Dollar of money will be paid to them while they remain where they are and behave as they have done beyond the \$30,000 under the first clause of the fourth article of the treaty; and that would be withheld so long as they did not manifest a proper spirit of compliance with their obligations, if that instrument did not require it to be paid as soon as convenient after being appropriated by Congress. If therefore they wish to receive their moneys next year and not to be compelled to remove by Military force, without getting them immediately after the expiration of the two years they stipulated in the treaty for them to remain where they are, they will at once change their conduct, listen to the advice of the agents of the government, and without delay, and in good faith, send off the exploring party to examine their new country, if they will do this the

Department is willing to gratify them by paying the improvement money at once; and in the hope that they will, it will immediately be remitted to you. Though the amount of the schedule furnished by you does not quite equal the sum set apart by the treaty towards the object, the whole will be sent, in order that you may have the means of rectifying any accidental errors, if any, which may have been committed in preparing the schedule, and this document is herewith returned lest you may not have retained a copy of it.

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443 They or at least the chiefs, into whose hands the money is payable by the government, doubtless know what they justly owe as national debts, and the latter are competent to make a proper disposition of the money, unless swayed by improper influence, and what the Dept sought in its instructions on the subject, was that you and Mr. Wistar the Commissioner for distributing the fund for the mixed bloods, should exert yourselves to counteract as far as possible any such influence and to render them any incidental advice and assistance in your power, as to the disposal of the fund with reference to the objects to which it was intended to be applied. Its application was to be determined by themselves. The payment of the money to them, as is specifically required by the treaty, absolves the government from all further responsibility or duty in relation to it except to do what and was desired of Mr. Wistar and yourself, you are therefore instructed to adopt this course, and it is hoped that you will have the assistance of the Military, for which application has been made, as you will perceive from the accompanying copy of a letter of this date to the Secy of War, in time to aid you to preserve peace, and preventing the Indians from being improperly interfered with.

You will perceive from the above mentioned letter, what is to be your relations towards the Military, and the general objects to which you are to direct your joint attention.

The question of the power to remove intruders from the lands occupied by the Indians, and to restrain others from going there,

444 is one of great delicacy, and involving important considerations, should be fully considered, and instructions on the subject given to you with as little delay as practicable, so that you may receive them by the time the Military reaches the country.

The conduct of Chas Corrow or Corron requires no action as he has been arrested and the case is in the hands of the judicial authority of the state.

Your nomination of Wm Powell as interpreter in place of Chas A Grignon is approved.

Very Respectfully

O. B.

W. A. C. BRUCE,
Sub Agt. Green Bay W-s

Augt 28, 1849.

Butler Esq Wm Cherokee Agent

SIR: Referring you to the letter from this office, of the 14 May last, to your predecessor, I have now to inform you that the result of the examination made in the office of the L Auditor, as contained in his report of 26 May, is that the balance (69 87/100) has not been paid on the award of the Commissioners under the 17 Art. of the Cherokee treaty of 1835-6 in the case of Johnson Foreman, and in favor of Grigsby & Hodges. A requisition therefore, for that sum under the head of "carrying into effect treaty with Cherokees," will immediately open in favor of Col Drennen, Act Supt. to be turned over to you for payment to Messrs Grigsby & Hodges, or to their legal representatives.

O. B.

OFFICE INDIAN AFFAIRS.

August 28, 1849.

Crawford Hon Geo W. Sec of War.

SIR: A state of affairs has arisen in the country occupied by the Menomonee Indians, near Green Bay, in Wisconsin, which requires the presence of a military force there, or in the vicinity, to exercise a proper influence over both Indians and whites—and, if not to prevent an outbreak & possibly bloodshed, to convince the former that the government is determined that they shall comply with the treaty obligations they are under, and the latter that they cannot be permitted to violate the rights of the Indians, nor improperly to interfere in their concerns. The presence of troops are *is* necessary also to secure proper respect for the authority of the government as vested in & exercised by the Indian Agent, & for the security of public funds in his hands. The Agent recommends dragoons, which would no doubt be the most efficient species of force, but it is presumed that they are not available. If they were, one company would answer, but if not, it is the opinion of this office that two companies of Infantry will be required, and, by direction of the Hon Secretary of the Interior, I have the honor respectfully to make a requisition on the War Department accordingly.

If Infantry be sent, it is presumed they can be without delay, from one or more of the posts on the upper lakes; and it is supposed that

Fort Howard will be sufficiently near the Indian country for
446 present purposes. And as the relative position of *of* the whites and Indians, and the nature of the relations of the latter with the government, until they are removed from the country, will be such as probably to render the presence of a military force there of much more importance than anywhere else in the north-west, in connection with our Indian relations, would respectfully suggest that arrangements be made for the troops to remain in that vicinity until the removal of the Indians takes place, which will probably be in about a year or eighteen months from this time.

I would therefore respectfully suggest to the Hon. Secretary of

War that the Commander of the force should, on his arrival, put himself in communication with the Indian Agent, and aid & co-operate with him as far as practicable & proper, in the discharge of his duties on any occasion of difficulty, and in seeing that the laws and regulations of the government are properly respected & observed & the Agent will be instructed to communicate fully to the commanding officer all his instructions, and to confer freely with him whenever occasion requires.

O. B.

OFFICE INDIAN AFFAIRS,

August 28, 1849.

Drennen Esq John Choctaw Agency.

SIR: I have to acknowledge the receipt of Mr Wilson's letter of the 4th instant, forwarding the accounts of S. M. Rutherford, late Acting Superintendent &c., for the 2d quarter of 1849, & his final account, from 1st to 19th July, 1849.

O. B.

OFFICE INDIAN AFFAIRS,

August 28, 1849.

Circular to Superintendents.

SIR: Your attention is called to the importance of this office being furnished, at an early period, with the usual annual reports from yourself & the Agents & Sub Agents of your Superintendency. They should reach here, at latest, by the 1st of November; & earlier, in cases where they can be prepared & transmitted sooner without omitting information of particular interest.

In order that the reports of the Agents & Sub Agents may be as complete and satisfactory as possible, they should, in themselves, embrace all matters of interest in relation to the tribes in their charge. Sub reports of farmers, mechanics, &c., to accompany them, should be dispensed with, & they contain the information usually embodied in such documents. They should also embrace a general view of the progress in education, & of the advance in—[No copy for conclusion.—PRINTER.]

447

GREEN BAY SUB. IND. AGENCY,

Sept. 24, 1849.

Hon. Orlando Brown, Commissioner of Ind. Affairs.

SIR: I have the honor to inform you, that I am about to leave this Sub Agency, on this day, in order to send off, if possible the exploring expedition of the Menominee Indians, on or before the 30th day of the present month and in obedience to your orders—

Brt. Col. Francis Lee has detailed a sufficient force to accompany me, and to protect the Public monies.

Col. Child, the conductor of the "Exploring expedition" is here

with every necessary preparation for their journey, and for their welfare and comfort by the way.

I am sorry to say, that I have not up to this time received any communication from the Department providing me with the five thousand dollars, for the improvements made by this Tribe in this State.

448 I trust my silence during the forthcoming twenty days, will be accounted for by the Department as in the execution of so necessary a duty, in which I am also compelled to take from my office my Secretary.

Should any communication, however reach Green Bay before the 30th I have made arrangements to have the same forwarded to me in the Indian Country by express.

My vouchers for the Stockbridge and Oneida Indian payments, also my annual reports and other matters connected with my disbursements and other duties of this Sub Agency will be forwarded immediately after my return from this duty.

Very Respectfully Your obt. Serv.

W. H. BRUCE,

Sub. Ind. Agt.

449

OFFICE OF SUB. IND. AGENCY,

GREEN BAY, Oct. 9, A. D. 1849.

Hon. Orlando Brown, Commissioner of Ind. Affairs.

SIR: I have the honor to inclose the account of Col. E. Child, conductor of the exploring expedition of Menomonees, &c. It is true that in obedience to your instructions, filed in this office, his pay should have stopped on the 30th of Sept. Inst. but at this time Col. Child was with me in this Menominee Indian Country, some 70 miles from this Sub Agency, with his outfit in charge. It became necessary that he should store it, and moreover from the quantity of other business I was, under necessity, compelled to engage his services up to the date set forth in his Voucher. I recommend his account of services to the favorable consideration of the Department.

Very Respectfully Your obt. Serv.

WM. H. BRUCE,

Sub. Ind. Agent.

450

OFFICE INDIAN AFFAIRS,

November 9, 1849.

Bruce, Esq., Wm. H., Green Bay, Wisconsin.

SIR: Your letter of the 24th Ult., has been received, and as it appears that the postponement of the Menomonee exploring expedition until Spring was unavoidable, it is approved. No measures should be omitted in the meantime to have it start as early as practicable.

You should in every possible way discourage any of the Menomonees from making any arrangements for remaining in Wisconsin, as it will be better for them all to remove together, and they are under

treaty obligations, and will be expected, to do so at a reasonably early period.

If any of the licensed traders in any way undertake to interfere with the policy of the government, in regard to the early removal of those Indians, as, it is inferred from your letter, some of them seem disposed to do, their license should be revoked.

O. B.

OFFICE INDIAN AFFAIRS.

November 9, 1849.

Lawson, Br. Gen'l Thos., Surg'n Gen'l U. S. Army.

SIR: I have had the honor to receive the letter of Doct. V. M. Satterlee, enquiring whether he is entitled to compensation for medical services rendered the Menomonees.

The Sub Agent at Green Bay, in a recent letter to this office, speaks of the sickness that prevailed among the Menomonees, and states that he had made all necessary arrangements for proper medical aid to them, but does not mention any particulars.

This office has no information as to the services rendered by Doct. Satterlee, other than his own statement; and as there are no funds applicable, the only way in which he could obtain any compensation to which he may be entitled, would be from the Indians themselves out of their annuities which the Department cannot touch for such purposes.

Doctor Satterlee's letter is herewith returned.

O. B.

451

OFFICE INDIAN AFFAIRS.

Jan'y 22nd, 1850.

Hon. I. D. Doty, House of Rep's.

SIR: I have the honor to inform you that your letter of the 29th Ult., to the President, enclosing a memorial from numbers of the christian party of the Menominee Indians, has with that memorial been refer-ed to this office, and carefully perused.

In reply I have the honor to inform you that the Department is satisfied that the treaty with the Menomonies of October 18, 1848, was fairly made, and that the amount stipulated, and which they agreed to receive for the cession of their lands in Wisconsin, was a fair consideration therefor. That treaty is the law of the land, and must be carried out according to its provisions. It has already been partly executed—large amounts having been paid out to the Indians under its provisions—and questions of the kind raised in the memorial refer-ed to cannot be entertained.

The land on Lake Pepin desired by the memorialists for a residence, does not as yet belong to the United States but to Sioux Indians; and when purchased cannot be assigned to the Menomonies or any portion of them, or to any other Indians, as it is required for our own population. It would also be contrary to the treaty, as well as to the policy of the government, to permit any portion of the

Menomones to remain in Wisconsin, their removal is necessary to free them from the embar-assments and evil influences under which they have for some time been suffering. If the christian and pagan parties of the tribe cannot live together after the removal of the tribe to their new country west of the Mississippi—which the Department does not believe—then will be the time to consider the subject of their difficulties and to provide a proper remedy.

O. B.

[Enclosed:] B 979. January 22", 1850. Letter from Hon. O. Brown to the Hon. I. D. Doty in relation to a Memorial to the President.

453

OFFICE INDIAN AFFAIRS,
January 22, 1850.

Doty, Hon. I. D., House of Rep's.

SIR: I have the honor to inform you that your letter of the 29th Ultio, to the President, enclosing a memorial from members of the "christian party" of the Menomonee Indians, has, with that memorial been referred to this office; and carefully perused.

In reply I have the honor to inform you that the Department is satisfied that the treaty with the Menomonees of October 18, 1848, was fairly made, and that the amount stipulated, and which they agreed to receive for the cession of their lands in Wisconsin, was a fair consideration therefor. That treaty is the law of the land & must be carried out according to its provisions. It has already been partly executed—large amounts having been paid out to the Indians under its provisions—and questions of the kind raised in the memorial referred to cannot be entertained.

The land on Lake Pepin desired by the memorialists for a residence does not as yet belong to the United States but to the Sioux Indians; and when purchased cannot be assigned to the Menomonees or any portion of them, or to any other Indians, as it is required for our own population. It would also be contrary to the treaty, as well as to the policy of the government, to permit any portion of the Menomonees to remain in Wisconsin. Their removal is necessary to free them from the embar-assments and evil influences under which they have for some time been suffering. If the Christian and Pagan parties of the tribe cannot live together after the removal of the tribe to their new country west of the Mississippi—which the Department does not believe—then will be the time to consider the subject of their difficulties & to provide a proper remedy.

O. B.

OFFICE INDIAN AFFAIRS,
January 22, 1850.

Ramsey, His Exc'y Alex., St. Paul, Minnesota.

SIR: I have had the honor to receive your letter of 11 instant, enclosing a license granted by Agent Fletcher to Charles R. Rice to

trade with the Winnebago Indians, together with the accompanying papers.

The license has been approved and is herewith returned.

O. B.

454

OFFICE INDIAN AFFAIRS,
May 13th, 1850.

Bruce, Col. W. H., Green Bay, Wisconsin.

SIR: It is the desire of this Department, so soon as you reach your Sub Agency, that you will proceed with all possible dispatch to organize a party of Indians of the Menomonee tribe, in accordance with the provisions of the 6th article of the treaty of 1848 to explore & fix upon a tract of land for their future permanent residence & that you will take charge of said party and accompany & direct their explorations; Geo. W. Lawe, who has this day been appointed in the place of Col. Ebenezer Childs, whose appointment as conductor of the contemplated party last year was suspended on the 30th September last and is now finally revoked, has been directed to report to you for duty & to place himself subject to your orders & direction in all things necessary for carrying into effect the proposed object; from your joint consultation & cooperation much is expected. His pay, under his letter of commission as Conductor will commence with his official assignment to duty by you; He will accompany the party when organized and, under your direction, do whatever may be deemed necessary to secure a satisfactory & successful result.

Your instructions of the 16th May last, and those at present furnished Mr. Lawe, are so full and ample & nothing having transpired since the date of your former ones to materially alter the views therein expressed, but little remains to be added to them at this time.

I would however embrace the present opportunity again to urge the earliest possible organization, compatible with the efficiency of your measures & comfort of the party & that, after the accomplishment of those two objects, too strict an observance of economy cannot be practised, crippled as the limited appropriation already is by the last years' fruitless effort to carry into effect this part of the treaty, & that under no circumstances or contingency shall the expenses of the party exceed the balance now remaining to the credit of the specific appropriation for that object.

Upon the subject of selecting the individuals who shall compose the party, their outfit, the route to be pursued and all other minor points connected with the expedition, you are authorized to exercise your own discretion and better judgment, believing that from your position and more accurate local information, you will be enabled to act to far better advantage than could be accomplished by any detailed instructions from this office. Upon the subject of their location, however, I would suggest, should there be no good reason to the contrary, that they be placed as near their friends the Winne-

455 bagoes as policy and propriety will admit. It would strengthen both *both* tribes against the Sioux and Chippewas, thereby probably preventing wars and bloodshed and may perhaps have a happy tendency towards rendering both tribes more contented

with their new homes. For the accomplishment of this object, however, I would guard you against losing sight of the vital policy of selecting for them lands as eminently adapted as possible to agricultural purposes. This requisite is deemed of the first importance.

Humanity as well as the policy of the Government forbid that this nation should be marched into and disbanded in a wilderness without shelter or any provision for their comfort or subsistence whatever; you are therefore authorized by and with the consent of the Indians in council assembled, so soon as the selection of a locality is determined upon, to contract for cheap, but substantial log cabins at such points as the delegates of the different bands may among themselves agree upon; not for the entire nation, but sufficient for the accommodation of the sick, the infirm, the feeble, the aged and young children of each band, of the number of which your better knowledge will guide you as to the number and extent of the cabins necessary to be constructed for this purpose.

You are authorized to contract for the breaking up a quantity of ground and planting such a crop of grain, pumpkins or other vegetables, as in your judgment is best adapted to the season, soil and wants of the Indians, and inasmuch as the bands vary in number, you will have to apportion the number of acres accordingly, say from 20 to 30 acres for the smallest band, observing the same ratio for larger ones.

You will be furnished the necessary funds for the foregoing purposes, say thirty-five hundred dollars, which sum shall in no case be exceeded; nor shall any part thereof be expended until it is fully explained to the Indians that this amount is drawn from the appropriation of \$20,000 in consideration of their subsisting themselves for the first year after their removal, as expressed in the fourth clause of the fourth article of the treaty, and their clear and undoubted sanction to the measure obtained.

Upon the return of the exploring party, should their nation wish to send all or any portion of them to this city on business of the tribe, this office will interpose no objection provided they defray the expenses of such delegation out of their own funds; and provided

456 further that you are yourself satisfied that their visit may be productive of some good result *result* either to themselves or the Government, or both.

It is not the policy of the Department to encourage frequent visits from Indians to the capitol, by defraying their expenses on such occasions, nor could any balance of the exploring fund that may remain unexpended, be applied to this purpose. You will therefore on this point exercise your own judgment as in other matters confided to your care & management, being authorized to sanction the visit of said delegation should you deem it advisable as aforementioned.

Referring you to former instructions and correspondence now in your possession for further details on this subject, I remain

O. B.

OFFICE INDIAN AFFAIRS,

May 10, 1850.

Eastman, Capt.

SIR: I would respectfully call your attention to the enclosed communication from a committee of Congress, in relation to removing the Winnebagoes.

The part — which I would particularly call your attention is the "fitness of Mr. Rice to perform the services." You did me the honor to express in a personal interview, a favorable opinion of his fitness—having had personal evidence of his influence with the Indians. Will you sir please state to me in writing the substance of what was said by you at a former interview—as the Committee desire written evidence.

O. B.

457

OFFICE OF INDIAN AFFAIRS,

May 10, 1850.

Lykins, Esq., J.

SIR: I have received your letter of 30 March last enclosing your account and vouchers for the 1st quarter of this year; and also report of the manual labor school among the Pottawatomies.

O. B.

GREEN BAY SUB AGENCY,

27 July, 1850.

SIR: I have the honor herewith to report a summary of my proceedings with the Menominee Exploring Expedition who went out to explore the country selected for them west of the Mississippi.

I left the Agency on the first of June with the intention of organizing the exploring party at Lake Pwawgun, which had been previously selected as the starting point. I was there joined by all the principal men of the nation who were able to undergo the fatigues of the journey. They were eleven in number and had with them two other Indians to serve as Cooks. They also requested of me the privilege of selecting two persons to assist them in exploring the country, to which request I acceded with the express stipulation that the persons so selected should have no claim whatever on the government for the services so rendered—and when the Indians found that Mr. Lawe did not join us, they requested that Mr. Child might accompany the expedition to aid me in the performance of my duties, to which request I also acceded—as we should thus be enabled after reaching the country designated as their future home to separate into different parties and make a more perfect and rapid examination than we could do if we should be compelled to remain together in a body—and in pursuance thereof the two persons selected as assistants by the Indians together with Mr. Child accompanied the delegation.

We have made a pretty thorough examination of the country, & have found it to contain many more advantages, as least so I
458 have reason to believe than the Indians anticipated; the Indians complain of the scarcity of deer though there is a

fair proportion of small game. The land is good, well situated and well watered—and there are several small lakes interspersed through it—which abound in fish—there is abundance of sugar maple from which the Indians can make all the sugar they need. On our way there we met several Indians Winnebagoes and Chippewas who were out hunting—on our return we fell in with several Sioux Indians members of the different bands of that nation who reside on the Mississippi river, and west of them on the prairie—they all appeared perfectly friendly and so far from expressing any objection whatever to the emigration of the Menominies, they declared themselves well pleased at the prospect of having the latter for neighbors.

Thus far however the Menominie Chiefs who composed the exploring party have remained perfectly silent as they wished to make their report to the nation before they would give any answer or any direction about making any improvements—my impression however is, that their report will be unfavorable—and that they will complain about the selection—this impression may be erroneous. I am induced to believe that they still nourish hopes that they will be permitted to remain where they are, or at least that they can do so, until the Government furnishes some country which they shall consider a desirable location, in case they are not pleased with the present selection. I would however remark that the persons selected by the Indians to assist them in exploring the country, have remarked to me that the selection made by the Government for their future home is fully as good as the country they now inhabit.

459 We have been somewhat detained in our journey in consequence of high water, which rendered the streams almost impassable, and overflowed all the low grounds—we have made a tour entirely around the land allotted to them and penetrated into the interior in many places as far back as five or ten miles; we were divided into three parties during a good part of the time and have acquired sufficient information to enable us to form a pretty accurate estimate of the quality of the soil and its capacities for agricultural purposes. The Winnebago crops in the vicinity of the location look well.

The party have been industrious, the Indians behaving with the utmost sobriety and were willing to go and do what was requested of them. The Indians have returned healthy and are to meet me at Lake Pwawgun on the twelfth of August for the purpose of giving me their answer. I shall without delay apprise the Department of the result with a more full and accurate detail of the expedition—and accompany the same with a map of the country—which I shall get drawn as soon as I have made up my quarterly accounts.

I have the honor to remain Very Respectfully,

Your Most Obedient Servant,

WM. W. BRUCE,
Sub. Ind. Agent.

To the Hon. Luke Lee, Comr. Indian Affairs.

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DEPARTMENT OF THE INTERIOR,
WASHINGTON, September 7, 1850.

SIR: The petition of the delegation from the Menominee tribe of Indians, presented at the request of the delegation by Hon. R. W. Thompson, has been considered by the President of the United States, to whom it is addressed. His action thereon, so far as relates to their application, to be permitted to remain temporarily at their present location, is shown in the accompanying copy of communication to this Department of the 5th instant.

You will inform Sub-Agent Bruce of the decision of the President in the premises.

Very respectfully,
Your ob't servant,

D. C. GODDARD,
Acting Secretary.

A. S. LOUGHERY, ESQ.,
Acting Commissioner, Indian Affairs.

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Copy.

WASHINGTON, Sept. 5, 1850.

To the Secretary of the Interior.

SIR: After careful consideration of the application by the Menominee Indians, to be permitted to remain temporarily upon the lands in Wisconsin ceded by them to the United States by treaty bearing date October 18, 1848, I perceive no objection to granting their request for a reasonable time; you will therefore inform them that they will be permitted to remain there until the 1st day of June next, provided they do not interfere with any surveys which may be ordered, and they must not understand this as granting any indulgence beyond that time.

Your ob't Serv't,
(Signed)

MILLARD FILLMORE.

462

H'D Q'RS, FORT HOWARD, WIS.
Sept. 2d, 1851.

SIR: In compliance with your instructions, of the 16th of July last, it may be well to remark: That the Menominee Indians are about 2,000 souls, and live by hunting. They have lately sold their lands and were to remove this summer to their new homes, west of the Mississippi. Upon their representation, that it lay in the midst of their enemies, and was otherwise unsuited to their wants, requested a part of the Wilcumiss, lying about 60 miles north of this post. The President has considered their petition, so far, that he permits them to remain where they now are, one year longer. In the meantime, he has directed Mr. Murray, the Superintendent of Indian Affairs, to make an examination of the country they ask for. You will have observed from the correspondence of Indian Agent Bruce, and others, that Indians were giving trouble upon

these frontiers previous to the arrival of troops at Fort Howard, since which time it has been all peace and quiet, which Mr. Murray attributes to the presence of troops, and so remarks in his official correspondence. When these people, the Menominees, are brought to the lands north of us, will not this fact give increased importance to Fort Howard as a point for military occupation? I think it will.

I am sir,

Very respectfully,

Your most ob't servant,

M. C. BONWERCK,

Lt. Co. & Mj.

Major O. F. Winship, A. A. General, U. S. Army, Troy, N. York.

464

Sept 30 1851.

Hon. L. Lea, Comr. of Indian Affairs.

SIR: In obedience to instructions I set out in July last to explore a Northern location for the Menomonee Indians, but a requisition to aid in collecting the Pottawatomie Indians, called me away from this duty.

I have the Honor to report that I have this day returned from exploring the country on the Wolf and Oconto Rivers.

I commenced at the South West corner of Township 28, on the Range line between 19 and 20, and run West (by calculation) 30 miles—thence North 18 miles—thence East 30 miles—thence South 18 miles to the place of beginning. These lines embrace the Wolf and Oconto Rivers, and will conform to the Public Surveys, leaving no fractions.

I find the country generally to be a dry Sandy Soil covered with low scrubby Pines, and occasionally a Swamp of tamarack and Cedar. There is a small portion of good Land for Agriculture, and a few good Sugar Camps. There are a great many small Lakes abounding with Fish and Wild Fowl, and Bear, Foxes and Martins appear to inhabit these Swamps.

The Deer are numerous on the Plains. There is also some good Pine Timber.

I consider the country of little value for a White Settlement, but well adapted to the Menomonee Indians. A portion of those are inclined to cultivate the Soil for their support and a sufficient quantity of pretty good Land will be found for their use. The Game and Fish will sustain the Hunters.

I am inclined to think they may all be persuaded eventually to seek subsistence from Agriculture.

At the special request of the Chiefs, I took three of them to wit: No Motte, Wau ke chi ou and Osh ke nash new with me. As there were no Roads, I also was obliged to hire a Boat and its owner and four men to row. One man with a light canoe to Hunt and a man

to Cook. Those with the Chiefs, Interpreters and myself made a party of twelve. Our voyage was by water about 180 miles above the mouth of the Wolf where it intersects Fox

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River, as the Boatmen who follow Lumbering calculate the distance. The line on the South side of the tract above described cross the Wolf River about four miles below the great Falls at which point there is a good Saw Mill with two Saws and excellent fixtures, cutting 12000 feet of Lumber per day. The Logs are cut from Public Land above the Mills and rafted down. I should think there were now 3000 Logs in the Dam. The Mill is built on a Rock foundation, and the owners are willing to sell it to the Indians. My interview with them was perfectly amicable.

Having to explore on foot (there being no Horses there) I entrusted the exploration in the rear of Wolf River on the East side, to the very sensible, capable and trust-worthy Interpreter, Mr. William Powell, whose Report I herewith enclose. I also solicit the Department to make him some reasonable allowance for his personal services on the discharge of this arduous duty. To comply with instructions to a punctilio, I yesterday morning left the Boat 150 miles above this, and came through the wilderness with a Guide. The Boat could not arrive here before the 3d or 4th of October. My instructions were to Report by first of October, which, by exertion, I now do.

The Indians are highly satisfied with the location I have recommended. They are very civil and appear peaceful and amicable in their disposition.

I attended service at their Mission, and many of them appear sincerely pious.

There are many personal explanations I should like to make, if ordered to Washington.

Excepting the Report of my account, I have, now, as far as I know, fulfilled all my instructions, and have vouchers for the faithful disbursement of the Annuities intrusted to my care.

I Remain Sir,

Most Respectfully Your Obt. Serv't.

466 ELIAS MURRAY,
Superintendent of Indian Affairs.

Green Bay, September 30th, 1851.

467 DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
June 1st, 1852.

SIR: I have received a letter from R. W. Thompson, Esq., Attorney for the Menominee Indians urging that the time for their removal be extended by the President until the 1st day of October next. The present unsettled condition of the business of these Indians, renders the extension necessary, and I therefore recommend that an order to that effect be immediately made.

Very respectfully your obt serv't,

L. LEA,
Commissioner.

Hon. Alex. H. Stuart, Secretary of the Interior.

Ordered according to the recommendation June 2d, 1852.

MILLARD FILLMORE.

468 [Endorsed:] 18. P. 38. O. 12a. Com'mr Indian Affairs. June 1, 1852. Has rec'd a letter from R. W. Thompson, Esq., Attorney for Menominee Indians, urging that the time for their removal be extended to 1st October next. Recommends that an order to that effect be immediately made. Returned to the Com'r approved by the President. Interior, June 3d, 1852. Rec'd June 2d, 1852.

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DEPARTMENT OF THE INTERIOR,
WASHINGTON, June 2d, 1852.

SIR: I have the honor to transmit herewith a letter from the Commissioner of Indian Affairs recommending that the time for the removal of the Menominee Indians, which expired yesterday, be extended to the first day of October next, in which recommendation I concur.

I am, sir, with great respect,
Your ob't serv't,

ALEX. H. H. STUART,
Secretary.

The President of the United States.

470

OFFICE SUPER'T. IND. AFF.,
SHEBOYGAN, June 13th, 1852.

SIR: I have the honor to be in receipt of your communication containing the intelligence that the President had extended the time for the removal of the Menominee Indians until the 1st day of October next, subject to the condition that they shall not interfere with the public surveys.

Very respectfully your ob't serv't,

E. MURRAY,
Superintendent, &c.

Hon. L. Lea, Com. Ind. Aff., Washington City.

471 FALLS OF WOLF RIVER, WISCONSIN, 3d November, 1852.

To our Great Father, the President of the U. S.:

We, the Chiefs, headmen of the Menominee nation of Indians, thank our great father, because he has thought of us, when we were so far off. He has heard our voice and has kept us from being sent to the Crow Wing river, and our hearts are made glad. We are now at our new homes on the Wolf & Oconto rivers and we feel happy. We will try & learn our young men to work the land, that they may raise provisions for our families. We will try & obey our great father's voice, in all things, because we know he is our friend.

We have just been removed from our old homes, and everything has been done to our satisfaction. We have been gratified at the

manner in which we were removed, and thank our great father for sending our friends to remove us, as we had requested him to do.

OSHIKOSH,	x his mark.
A YAH ME TAH,	x his mark.
SOALIGNES,	x his mark.
KE SHE NAH,	x his mark.
LA MOTTE,	x his mark.
CORRON,	x his mark.
KE NAY WY TAH NOT,	x his mark.
SHA WA NO PE NAPE,	x his mark.
WAY TAW SAH,	x his mark.
PE QUAH QUON NAH,	x his mark.
AH KO NE MA,	x his mark.
OSH KE NAN NUW,	x his mark.
TAY KO,	x his mark.
KO MAN IKIN OSE,	x his mark.
WIS KE NO,	x his mark.
AH KIN NIT O WAY,	x his mark.
AH KOM MOTE,	x his mark.
CHE CHE QUAN A WAN,	x his mark.
O KAY MAW PE NAPUIR,	x his mark.
SHAB WAY TUCK,	x his mark.
PY AW WAY SHAY SHAL,	
	x his mark.
AH PEM MIS SHAIW,	x his mark.
MUK KOT TA PE NASSIEW,	
	x his mark.
WAH PIN NAN NOSE,	x his mark.

Signed in Presence of—

E. MURRAY,
Super't, &c.;
 GEO. W. LOWE,
Sub. Ind. Ag't;
 CHARLES A. GRIGNORY.
 WILLIAM POWELL,
U. S. Interpreter;
 S. JUNEUE,
Ag't Grignon;
 F. J. BONDUEL,
*Superintendent of the Menomonee
 School and Mission;*
 H. L. MURREY.
 I. B. JACOBS.
 H. W. JONES,
Clerk to Sup'nt;
 CHAS. TULLAR,
Clerk & Assistant to Sub. Agent.

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WOLF RIVER FALLS,
Dec. 6th, 1852.

To Hon. E. Murray, Supt. Ind. Affairs.

DEAR SIR: We take the opportunity by the return of our friends, Mess'r Powell and Tullar, to Green Bay, to drop you a line relative to our affairs.

When we last had an interview with you we had some thought of establishing ourselves at some point on the Oconto River, thinking from representations that had been made to us that it would be a more favorable point than our present location.

With this view we sent a delegation of some of our people to take a look at that country, and upon their report we are satisfied that the country there is not such as we had reason to believe it to be,

474 and upon full and careful reflection we have come to the conclusion that, taking everything into consideration, it would be most for our interest and the welfare of the tribe to remain at this place. We believe that the tribe will be more likely to be concentrated at this point than at any other, and that our young people would be less exposed to the evil influences of the whites than they would be on or near the shore of Green Bay.

We hope and believe that our determination on this subject will be agreeable to the wishes of our Father, and that he will appreciate our motives in coming to this decision.

We regret that we had not an opportunity when you was here of expressing our views with regard to schools.

You are aware that under the provisions of the Treaty of 1848 a sum was set apart for a manual labor school, and as the representatives of the Christian party of our tribe, and the first who have made any advances toward civilization that this money should be appropriated and applied to the establishment of such school

475 as soon as possible.

We are deeply sensible of the advantages to be derived by our youth and children from the establishment of good schools, and we hope that our Father will make such representations to our Great Father, the President, as will induce him, as soon as the same can be done, to make an appropriation and application of this fund to the establishment of such a school according to such a plan as he may think best.

We have no doubt but that a well-conducted manual labor school would have a very happy effect in reclaiming the young people of our tribe from the habits of the chase and inducing them to cultivate habits of industry and civilization.

Wishing you health and prosperity, we subscribe ourselves,

Your friends,

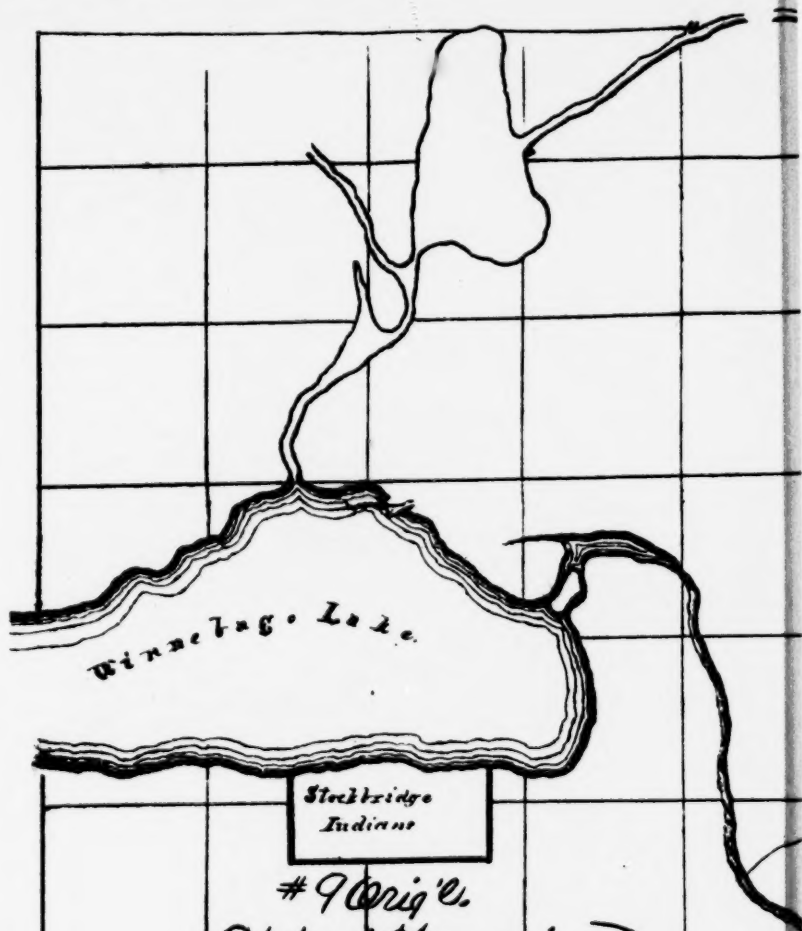
CORRON	his x mark.
LAMOTTE	his x mark.
TAY-KO	his x mark.
A-YUM-E-TAH, by his son,	his x mark.
OSH-KE-HE-NAN-NIEW	his x mark.

WAY TAW SAY,	his x mark.
KOMANAKIN OR LITTLE WAVE,	his x mark.
SHAW WA NO KI SHEEP,	his x mark.
NAW NO TUM,	his x mark.
ME SHAW QUET,	his x mark.
WAW NAN A KIT,	his x mark.
O KAY RAW STEAK,	his x mark.
SHAW WA NO ME TAH,	his x mark.
SAW NEES,	his x mark.
KY AH NO MEK,	his x mark.
MACH O MAN O MIN,	his x mark.
MAT TIK O SHAH,	his x mark.
KI SHE WE AW TAH,	his x mark.
SHAW WA NO MAK KIEW,	his x mark.
KAH KOACH,	his x mark.
O PE NAH MA KIEW,	his x mark.
NAT TO KA SHICK,	his x mark.
O PAH SHE MIN,	his x mark.
SKE SHE QUO UM,	his x mark.
SHE NAW NON NIEW,	his x mark.
MAW KAH SHAW BAEW,	his x mark.
O MEECH,	his x mark.
KIN NAY,	his x mark.
PE AIR,	his x mark.
BEAU BEC,	his x mark.
WAY SHE KAW,	his x mark.
WAW PE KIN NEIS,	his x mark.
KAY TO TAH,	his x mark.
TAH QUAU GON NAH, BY HIS WIFE,	her x mark.
KE NE BO WAY,	his x mark.
PE QUOACH A NENNI, PR. SON,	his x mark.
WAW KE TAW KUM E KO,	his x mark.
WALL BA NASH KUM,	his x mark.
JEAN BATISTE,	his x mark.
WAU PE TAH CHEAH,	his x mark.
WY TAH KON NET,	his x mark.
PE TAW NO QUET,	his x mark.
SHAW WA NO KI STACK,	his x mark.
O KAY MAW STEAK SEN,	his x mark.
PAH WAW NA,	his x mark.
TAH PAW QUO TAH,	his x mark.

Signed and explained to the Indians and written at their request
in our presence.

CHARLES TULLAR.
WILLIAM POWELL.

(Here follows diagram, marked p. 477.)



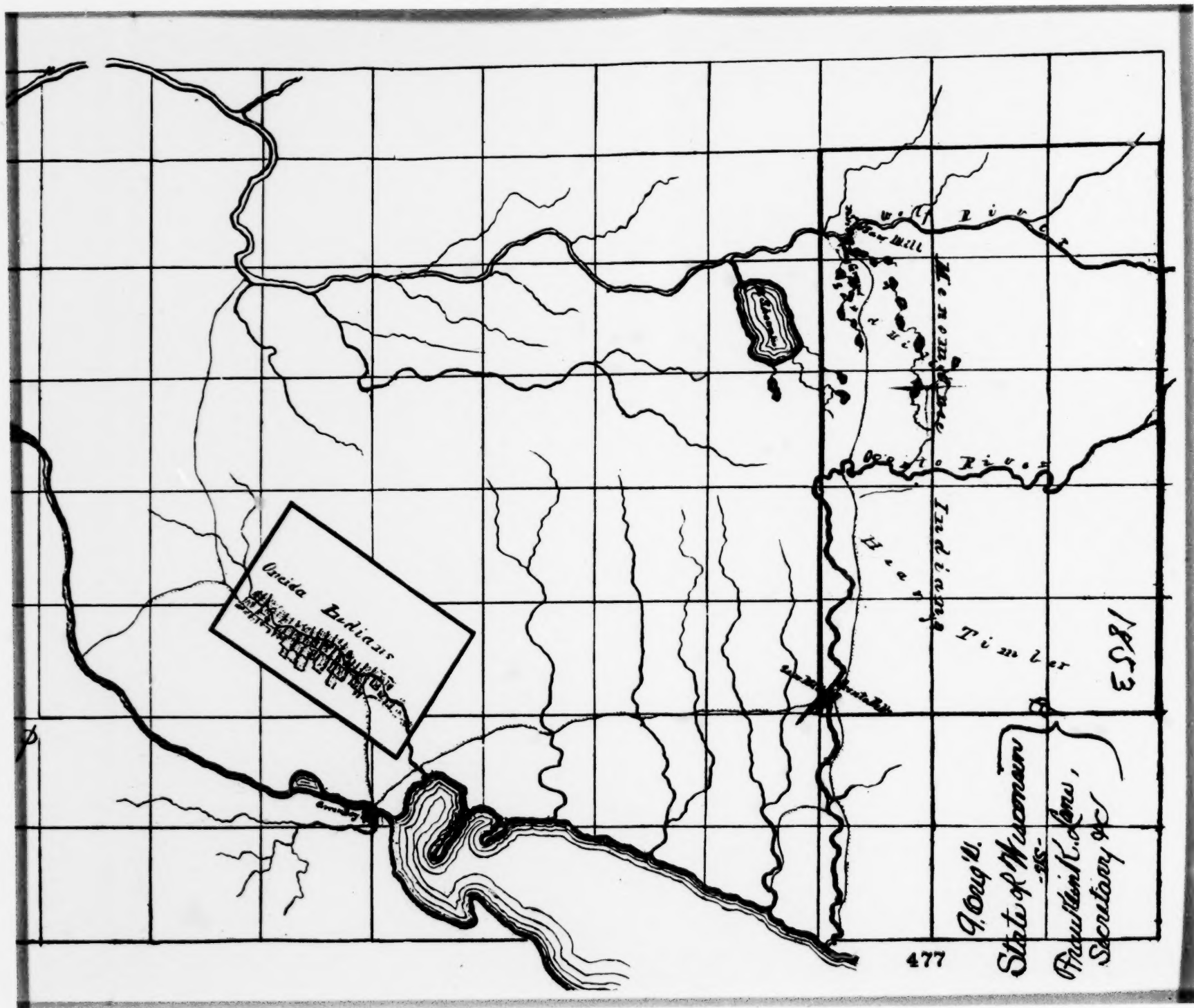
Winnebago Lake

Stockbridge
Indians

#9 Orig'l.

State of Wisconsin

Franklin K. Lane, Jr. } p



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H. OF REP.,
March 9, 1854.

SIR: I herewith enclose the acct. of Col. Chas. Tullar for services rendered the Menominee Indians in running out and marking their reservation in Wisconsin. I desire that the same be audited and paid. I also endorse the letter of Col. Tullar to Mr. Martin which will explain the same.

Respectfully,

Your Obt. S^vt,

BEN C. EASTMAN.

Hon Geo. W. Monypenny, Com. Ind. Affairs.

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(Duplicate.)

To the Chiefs of the Menomonee Nation.

I propose to run a boundary line around your tract of country on the Wolf river, to mark the line plainly and to set a post at every mile and mark it in such a way that any person will readily know the distance east or west from Wolf river for the sum of \$550, two hundred & seventy five dollars this year and the balance of \$275 next year.

CHARLES TULLAR.

Wolf River Pay General, Nov. 11th, 1852.

Accepted in open council of the Menomonee Chiefs and ordered that the Agent pay out of the annuity this year one half of the amount, viz. \$275, and the other half next year, without any further consideration or council on the subject.

GEO. W. LAWE,
Sub Ind. Agt.

Nov. 11th, 1852.

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LITTLE CHUTE, Feb. 7, 1854.

DR. SIR: I take the liberty of enclosing to your address a certificate of endorsement made by George W. Lawe, Esq., late U. S. Sub. Ind. Agent upon a claim in my favor against the Menomonee tribe of Indians.

In the fall of 1852 I was employed by the Chiefs in Council in presence of, and with the sanction, of Hon. E. Murray, late Superintendent of Indian Affairs, and Geo. W. Lawe, Esq., late Sub. Ind. Agent, to run and mark the boundary line of their new tract upon Wolf river for the sum of \$550 in accordance with a proposition which I made to them at the time—stipulating to pay me one-half the amount \$275, in advance and the remaining half at their next annuity payment. They paid me as agreed \$275, and I immediately went on in good faith and completed the job according to agreement, at a very inclement season of the year, viz., in November &

481 December. My claim was presented for payment at their annuity payment in Oct. last and Mr. Heubschann the pres-

ent Superintendent declined paying it—informing the Indians that there would probably be some other fund provided before long for paying that class of claims. I consider it a hardship to be compelled to wait an indefinite time to obtain my just due, and should esteem it a great favor if you would while in Washington call at the Indian Bureau and ascertain if there is any way in which I can get my pay.

Very respectfully,

CHAS. TULLAR.

Hon. M. L. Martin, Great Bay.

P. S.—The Indians acknowledged in Council at the last payment that the claim was just.

482 [Endorsed:] Green Bay E. 131. Hon. B. C. Eastman H. R. March 9, '54. O. 35a. Enc. letter from Charles Fuller and agreement with Chiefs of Menomonee Nation rel. to claim for \$275 bal. due him for running boundary line. Mr. Roche. Rec'd March 10, '54. Ans. July 5, 1854. 10 Finance.

483 DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, Jan. 15, 1916.

I, E. B. Meritt, Assistant Commissioner of Indian Affairs, do hereby certify that the papers hereto attached are true copies of the originals as the same appear on file in this Office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this Office to be affixed, on the day and year first above written.

[SEAL.]

E. B. MERITT,
Assistant Commissioner.

[United States internal revenue documentary stamp, series of 1914, 10 cents, canceled 1/15/16. M.]

484 Letter Press Book.

Vol. —. Charged to ——. Date ———, 191—. Pr. Ex. Nos. 79 to 111 incl.

485 P. Ex. No. 113.

STATE OF WISCONSIN,
Land Department:

[Arms of the State of Wisconsin.]

MADISON, March 30th, 1916.

I, Wm. H. Bennett, Chief Clerk of the Wisconsin, State Land Office hereby certify that the annexed copy of the original record of Sixteenth Section Land, Certificate No. 77.

Covering North East Quarter of the North East quarter, or lot Number one (1) Section 16, Township 28, Range 14 East, has been compared with the original record of said patent now on file in the office of the Commissioners of the Public Lands of Wisconsin and that the same is a true copy thereof, and of the whole of such original record.

In Testimony Whereof, I have hereunto set my hand and affixed the official seal of the Commissioners of the Public Lands at the Capitol, in the City of Madison, this thirtieth day of March, A. D. 1916.

[SEAL.]

W. H. BENNETT,
Chief Clerk.

10c revenue stamp cancelled.

486 School and University Lands, Shawano County.

Duplicate Certificate No. 77.

Commissioners' Certificate.

STATE OF WISCONSIN,
OFFICE OF THE COMMISSIONERS OF
SCHOOL AND UNIVERSITY LANDS,
MADISON, December 3, A. D. 1859.

At a sale of School and University Lands, in the County of Shawano in accordance with the provisions of the laws of the State of Wisconsin, Thos. James purchased Lot No. one in Township No. twenty-eight, North of Range No. fourteen east, being the Northeast quarter of the north east quarter of Section No. Sixteen as appears from the plats of said lands now of record in the office of the Secretary of State containing forty acres and hundredths, amounting to the sum of eighty three dollars and twenty-four cents, of which amount the said purchaser paid at the time of purchase the sum of nine dollars and twenty-four cents, on account of the purchase money, and — dollars and forty cents: being the interest on the amount unpaid to the first day of January next, at the rate of seven per cent, per annum.

Now, if the said purchaser, his, heirs, assigns, or other legal representatives, shall pay to the State Treasurer, at his office, the further sum of seventy four dollars and — cents, being the amount unpaid of the purchase money, in one or more installments, at any time within ten years from the date hereof; and also the interest annually, in advance on the first day of January in each year, in each and every year at the rate of seven per cent. per annum, on said unpaid amount and shall also pay to the proper officer all taxes which may be levied upon said lot, as the same shall become
487 due then and in that event only, will the said purchaser his, heirs, assigns or other legal representatives, be entitled to a Patent for the lands herein described. But in case of non payment into the State Treasury of the purchase money aforesaid, as

it shall become due, or of the interest thereon, by the first day of January, or on or before the fifth day of March next thereafter, in each and every year, and in case of the non-payment of any taxes as aforesaid, by the said purchaser, or by any person claiming under him, then this Certificate from the time of such failure shall be utterly void and of no effect, and the Commissioners may take possession of said land and resell the same.

In Witness Whereof, We the undersigned Commissioners of School and University Lands, have hereunto set our hands, at the place and date first above written.

(Signed)

SAM'L D. HASTINGS,
State Treasurer.
GABRIEL BOUCK,
Attorney General.

Countersigned:

D. W. JONES,
Secretary of State.

In Presence of

JACOB SEEMANN.
C. R. GLEASON.

STATE OF WISCONSIN,
Dane County, ss:

Be it remembered, That on this third day of December in the year of our Lord one thousand eight hundred and fifty-nine before me, the subscriber, a notary public, came the above Commissioners of School and University Lands, and acknowledged that they voluntarily executed the above Certificate as Commissioners aforesaid for the uses mentioned and purposes therein mentioned.

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C. R. GLEASON,
Notary Public.

For and in consideration of the sum of Five hundred dollars to me in hand paid, the receipt of which is hereby acknowledged, I, Thomas James hereby Sell, Transfer and Assign to Richard J. Harney all my right, claim, and interest in and to the within Certificate, and the Land therein described.

Witness my hand and seal, this eighth day of May, A. D. 1861.

THOMAS JAMES. [L. s.]

In presence of

G. A. RANDALL.
J. BROWN.

STATE OF WISCONSIN,
Winnebago County, ss:

On this eighth day of May, A. D. 1861, personally came before me the above named assignor and acknowledged the execution of

the foregoing assignment for the uses and purposes therein mentioned.

G. A. RANDALL,
Notary Public.

For and in consideration of the sum of Three Hundred and Eighty dollars, to me in hand paid, the receipt whereof is hereby acknowledged, I Richard H. Harney hereby sell Transfer and Assign to Fanny D. Hunter all my right, claim and interest in and to the annexed certificate, and the land therein described.

Witness my hand and seal, this Sixth day of October, A. D. 1863.

R. J. HARNEY. [SEAL.]

In presence of

H. C. HADLEY.
J. A. BATE.

489 STATE OF WISCONSIN,
County of Dane, ss:

On this sixth day of October, A. D. 1863 *A. D. 1863*, personally came before the above named Assignor and acknowledged the execution of the foregoing assignment for the uses and purposes therein mentioned.

J. A. BATE,
Notary Public.

50c revenue stamp.

490 P. Ex. No. 114.

[Arms of the State of Wisconsin.]

STATE OF WISCONSIN,
LAND DEPARTMENT,
MADISON, Mar. 30, 1916.

I, W. H. Bennett, Chief Clerk of the Wisconsin State Land Office, hereby certify that the annexed copy of the original record of School Land Patent No. 2736.

Covering the North east quarter of the north east quarter of section 16, Township 28, Range, 14 East, has been compared with the original record of said patent now in the office of the Commissioners of the Public Lands of Wisconsin and that the same is a true copy thereof, and of the whole of such original record.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Commissioners of the Public Lands at the Capitol, in the City of Madison, this thirtieth day of March, A. D. 1916.

[SEAL.]

W. H. BENNETT,
Chief Clerk.

10c revenue stamp cancelled.

491 STATE OF WISCONSIN,
Sixteenth Section:

No. 2736.

[Arms of the State of Wisconsin.]

To all to Whom these Presents Shall Come, Greeting:

Whereas, By an act of the Congress of the United States approved August 6th, 1846, entitled "An act to enable the people of the Wisconsin Territory to form a constitution and state government, and for admission of such State into the Union," the sections numbered sixteen in every township of the Public Lands of this State were granted to the said State of Wisconsin for the use of schools and whereas, by the Constitution of this State, such Sixteenth sections were accepted for such use; and Whereas, it appears by the reports and records of the Commissioners of School and University Lands, that full payment was made by Fanny D. Hunter on the 6th day of October, A. D. 1863, according to the provisions of law for the following described tract of land, a part of the lands so granted, to-wit: North east quarter of the north east quarter of Section No. sixteen (16) in Township No. twenty-eight (28) North of Range No. fourteen (14) East containing forty (40) acres, more or less, according to Government Survey, and situated in the County of Shawano and State of Wisconsin, according to the official plats of the survey of the said lands returned to the office of the Secretary of State, by the appraisers of such Lands, as provided by law, which said tract has been purchased in pursuance of law by the said Fanny D. Hunter the consideration being the sum of eighty three and 24/100 dollars.

Now, Know Ye, That the State of Wisconsin, in consideration of the premises, and in conformity with the several acts of the Legislature of the State of Wisconsin, in such case made and provided, has Bargained, Sold, granted and conveyed, and by 492 these presents does Bargain, sell, grant and convey, unto the said Fanny D. Hunter and to her heirs and assigns, the above described tract of land;

To Have And To Hold The Same, together with all the rights, privileges immunities and appurtenances of whatsoever nature thereunto belonging unto the said Fanny D. Hunter, and to her, heirs, and assigns forever.

In Testimony Whereof, We, James T. Lewis, Samuel D. Hastings and Winfield D. Smith, Commissioners of the School and University Lands of the State of Wisconsin, have caused these Letters to be made patent, and the Secretary of State has caused his official Seal to be hereunto affixed.

Given Under Our Hands, at Madison, this seventh day of October

in the year of our Lord one thousand eight hundred and sixty-three.

[SEAL.]

JAMES T. LEWIS,
Secretary of State;
SAM'L D. HASTINGS,
State Treasurer;
WINFIELD SMITH,
Attorney General,
Commissioners of School and University Lands.

Certified copy of Patent No. 2736 The State of Wisconsin to Fanny D. Hunter.

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P. Ex. No. 115.

STATE OF WISCONSIN,

Office of Commissioners of the Public Lands:

I, W. H. Bennett, Chief Clerk of the Wisconsin, State Land Office hereby certify that it appears from the books, files and records in the office of Commissioners of the Public Lands of Wisconsin, of which I am the legal custodian, that the several parcels of land described on the annexed sheets, numbered from one to five, inclusive, were sold by the State on certificates as per numbers designated or for cash, on the dates set opposite the respective descriptions.

In testimony whereof, I have hereunto set my hand and affixed the official seal of the Commissioners of the Public Lands at the Capitol, in the city of Madison, this fifth day of April, A. D. 1916.

[SEAL.]

W. H. BENNETT,

Chief Clerk.

10c revenue stamp cancelled.

494 *Section 16, Township 28, Range 13, East.*

Part of section.	No. of certificate.	Date of sale.
N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$	371	May 27, 1873
N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$	350	May 31, 1869
S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$	420	Sept. 19, 1873
S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$	372	May 27, 1873
N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$	251	May 31, 1869
N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$	367	May 16, 1873
S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$	518	Nov. 17, 1883
S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$	369	May 16, 1873
N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$	421	Sept. 19, 1873
N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$	Cash Sale	Aug. 6, 1883
S. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$	Cash Sale	Sept. 14, 1881
S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$	Cash Sale	Sept. 14, 1881
N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$	454	Feb. 12, 1876
N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$	422	Sept. 19, 1873
S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$	519	Nov. 17, 1883
S. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$	373	May 27, 1873

Section 16, Township 28, Range 14, East.

N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$	77.....	Dec. 3, 1859
N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$	78.....	Dec. 3, 1859
S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$	79.....	Dec. 3, 1859
S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$	80.....	Dec. 3, 1859
N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$	138.....	Jan. 4, 1864
N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$	Cash Sale.....	Dec. 31, 1885
S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$	Cash Sale.....	Jan. 14, 1882
S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$	Cash Sale.....	Sept. 29, 1881
N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$	Cash Sale.....	Feb. 7, 1885
N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$	9277.....	Jan. 21, 1886
S. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$	Cash Sale.....	Dec. 31, 1885

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S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$	Cash Sale.....	Dec. 31, 1885
N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$	134.....	Oct. 5, 1863
N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$	447.....	Dec. 10, 1874
S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$	448.....	Dec. 10, 1874
S. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$	Cash Sale.....	Aug. 28, 1881

Section 16, Township 28, Range 16, East.

Part of section.	No. of certificate.	Date of sale.
N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$	161.....	July 15, 1857
N. W. N. E.	162.....	" " "
S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$	163.....	" " "
S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$	164.....	" " "
N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$	165.....	" " "
N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$	166.....	" " "
S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$	167.....	" " "
S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$	168.....	" " "
N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$	169.....	" " "
N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$	170.....	" " "
S. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$	171.....	" " "
S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$	172.....	" " "
N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$	173.....	" " "
N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$	174.....	" " "
S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$	175.....	" " "
S. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$	176.....	" " "

Section 16, Township 29, Range 13, East.

N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$	1112.....	Dec. 10, 1858
N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$	1113.....	" " "
S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$	1114.....	" " "
S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$	1115.....	" " "
N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$	277.....	July 15, 1857
N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$	278.....	" " "

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S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$	279.....	
S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$	280.....	July 15, 1857
N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$	281.....	" " "
N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$	282.....	" " "
S. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$	283.....	" " "
S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$	284.....	" " "
N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$	285.....	" " "
N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$	286.....	" " "
S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$	287.....	" " "
S. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$	288.....	" " "

Section 16, Township 29, Range 14, East.

Part of section.	No. of certificate.	Date of sale.
N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$	289.....	July 15, 1957
N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$	290.....	" " "
S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$	291.....	" " "
S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$	292.....	" " "
N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$	293.....	" " "
N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$	294.....	" " "
S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$	295.....	" " "
S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$	296.....	" " "
N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$	297.....	" " "
N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$	298.....	" " "
S. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$	299.....	" " "
S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$	300.....	" " "
N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$	301.....	" " "
N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$	302.....	" " "
S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$	303.....	" " "
S. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$	304.....	" " "

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Section 16, Township 29, Range 16, East.

N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$	10056.....	Dec. 13, 1888
N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$	10057.....	" " "
S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$	10058.....	" " "
S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$	10059.....	" " "
N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$	10060.....	" " "
N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$	10061.....	" " "
S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$	10061.....	" " "
S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$	10063.....	" " "
N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$	10064.....	" " "
N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$	10192.....	Jan. 3, 1898
S. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$	10065.....	Dec. 13, 1888
S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$	10066.....	" " "
N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$	10067.....	" " "
N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$	10068.....	" " "
S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$	10069.....	" " "
S. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$	10070.....	" " "

Section 16, Township 30, Range 13, East.

Part of section.	No. of certificate.	Date of sale.
N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$	431	July 15, 1857
N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$	432	" " "
S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$	433	" " "
S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$	434	" " "
N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$	435	" " "
N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$	436	" " "
S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$	437	" " "
S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$	438	" " "
N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$	439	" " "
N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$	440	" " "
S. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$	441	" " "
S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$	442	" " "
N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$	443	
N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$	444	July 15, 1857.
S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$	445	" " "
S. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$	446	" " "

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Section 16, Township 30, Range 14, East.

N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$	447	July 15, 1857.
N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$	448	" " "
S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$	449	" " "
S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$	450	" " "
N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$	451	" " "
N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$	452	" " "
S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$	453	" " "
S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$	454	" " "
N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$	455	" " "
N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$	456	" " "
S. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$	457	" " "
S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$	458	" " "
N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$	459	" " "
N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$	460	" " "
S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$	461	" " "
S. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$	462	" " "

Section 16, Township 30, Range 15, East.

Part of section.	No. of certificate.	Date of sale.
N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$	463	July 15, 1857.
N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$	464	" " "
S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$	465	" " "
S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$	466	" " "
N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$	467	" " "
N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$	468	" " "
S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$	469	" " "
S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$	470	" " "
N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$	471	" " "

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N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$	472.....	July 15, 1857
S. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$	473.....	" " "
S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$	474.....	" " "
N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$	475.....	" " "
N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$	476.....	" " "
S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$	477.....	" " "
S. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$	478.....	" " "

Section 16, Township 30, Range 16, East.

N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$	479.....	July 15, 1857
N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$	480.....	" " "
S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$	481.....	" " "
S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$	482.....	" " "
N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$	483.....	" " "
N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$	484.....	" " "
S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$	485.....	" " "
S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$	486.....	" " "
N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$	487.....	" " "
N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$	488.....	" " "
S. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$	489.....	" " "
S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$	490.....	" " "
N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$	491.....	" " "
N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$	492.....	" " "
S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$	493.....	" " "
S. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$	494.....	" " "

CHART

TOO

LARGE

FOR

FILMING

501

D. Ex. C.

The following statements concerning the surveys of Tps. 28, 29, and 30, N. Rs. 13, 14, 15 and 16 E. 4th P. M., Wisconsin, are based upon a careful examination of the plats and field notes of said surveys and other records pertinent thereto on file in the General Land Office.

T. 28 N., 13 E.

Field Notes report:

North boundary surveyed October 24th, 1852.

East boundary " October 16th, 1852.

South boundary no date of Survey.

West boundary surveyed October 15th, 1852.

Subdivisions commenced October 15, 1853.

Subdivisions completed November 2, 1853.

Plat reports:

All boundaries surveyed October and November 1852.

Subdivisions " October and November 1853.

The plat was approved by the Surveyor General March 13, 1854, and was received at this office with his letter of March 13, 1854. By letter of March 23, 1854, the receipt of the plat was acknowledged and on that date the account for the subdivisions was submitted to the Comptroller of the Treasury for payment under report No. 3631.

T. 29 N., R. 13 E.

Field notes report:

North boundary surveyed May 5, 1853.

East boundary " October 25-26, 1852.

South boundary " October 24, 1852.

502

West boundary " May 3-4, 1853.

Subdivisions commenced July 10, 1854.

Subdivisions completed July 31, 1854.

Plat reports:

All boundaries surveyed October 1852 and May 1853.

Subdivisions " July 1854.

The plat was approved by the Surveyor General October 11, 1854, and was received at this office with his letter of October 11, 1854. By letter of October 19, 1854, the receipt of the plat was acknowledged, and on that date the account for the subdivisions was submitted to the Comptroller of the Treasury for payment under report No. 3992.

T. 30 N., R. 13 E.

Field notes report:

North boundary surveyed June 16-17, 1851.
 East boundary " November 7, 1852.
 South boundary " May 5, 1853.
 West boundary " May 14, 1853.
 Subdivisions commenced November 4, 1854.
 Subdivisions completed November 21, 1854.

Plat reports:

North boundary surveyed June, 1851.
 East, west and south boundaries surveyed May 1, 1853.
 Subdivisions surveyed November, 1854.

The plat was approved by the Surveyor General February 6, 1855 and was received at this office with his letter of February 6, 1855.

By letter of February 17, 1855, the receipt of the plat was 503 acknowledged, and on that date the account for the subdivisions was submitted to the Comptroller of the Treasury for payment under report No. 4291.

T. 28 N., R. 14 E.

Field notes report:

North boundary, no date of survey.
 East boundary surveyed October 17, 1852.
 Resurveyed December 18-22, 1890.
 South boundary surveyed October 6, 1852.
 West boundary " October 16, 1852.
 Subdivisions commenced May 29, 1854.
 Subdivisions completed June 16, 1854.

Plat reports:

All boundaries surveyed October, 1852.
 Subdivisions " May and June, 1854.

The plat was approved by the Surveyor General October 11, 1854 and was received at this office with his letter of October 11, 1854. By letter of October 19, 1854, the receipt of the plat was acknowledged, and on that date the account for the subdivisions was submitted to the Comptroller of the Treasury for payment under report No. 3992.

T. 29 N., R. 14 E.

Field notes report:

North boundary surveyed November 4, 1852.
 East boundary " October 26, 1852.
 Resurveyed June 11-17, 1891.
 504 South boundary, no date of survey.
 West boundary surveyed October 25-26, 1852.
 Subdivisions commenced June 17, 1854.
 Subdivisions completed July 7, 1854.

Plat reports:

All boundaries surveyed October and November, 1852.

Subdivisions " June and July, 1854.

The plat was approved by the Surveyor General October 11, 1854, and was received at this office with his letter of October 11, 1854. By letter of October 19, 1854, the receipt of the plat was acknowledged, and on that date the account for the subdivisions was submitted to the Comptroller of the Treasury for payment under report No. 3992.

T. 30 N., R. 14 E.

Field notes report:

North boundary, no date of survey.

South boundary surveyed November 4, 1852.

East boundary surveyed November 8-11, 1852.

West boundary " November 7, 1852.

Subdivisions commenced October 16, 1854.

Subdivisions completed November 3, 1854.

Plat reports:

North boundary surveyed June 1851.

East, west and south boundaries surveyed November, 1852.

Subdivisions surveyed October and November, 1854.

The plat was approved by the Surveyor General, February 6, 1855, and was received at this office with his letter of February 6, 1855. By letter of February 17, 1855, the receipt of the plat was acknowledged, and on that date the account for the subdivisions was submitted to the Comptroller of the Treasury for payment under report No. 4291.

T. 28 N., R. 15 E.

Field notes report:

North boundary surveyed December 15-17, 1890.

East boundary " October 18-20, 1852.

Resurveyed December 9-12, 1890.

South boundary east of Wolf River, no date of survey.

West of river surveyed October 5, 1852.

Resurveyed December 23-27, 1890.

West boundary surveyed October 17, 1852.

Resurveyed December 18-22, 1890.

Subdivisions and subdivision of sections survey commenced December 29, 1890; completed May 27, 1891.

Plat reports:

All boundaries surveyed December 9 to 27, 1890.

Subdivisions surveyed December 29, 1890, to April 22, 1891.

Subdivision of sections surveyed April 23 to May 19, 1891.

Meanders Surveyed May 20 to 27, 1891.

The plat was approved by Thomas H. Carter, Commissioner of the General Land Office, August 28, 1891, and on September 10,

1891, the account for the subdivisions was transmitted to the Indian office.

T. 29 N., R. 15 E.

506 Field notes report:

North boundary surveyed November 3, 1852.
Resurveyed June 4-10, 1891.
East boundary, no date of survey.
Resurveyed May 28-June 3, 1891.
South boundary surveyed December 15-17, 1890.
West boundary " October 26, 1852.
Resurveyed June 11-17, 1891.
Subdivisions commenced May 28, 1891.
Subdivisions completed July 2, 1891.
Subdivision of sections commenced July 3, 1891; completed August 17, 1891.

Plat reports:

All boundaries surveyed May 28 to June 17, 1891.
Subdivisions surveyed May 28 to July 2, 1891.
Subdivision of sections surveyed July 3, to August 11, 1891.
Meanders surveyed August 12, to 17, 1891.

The plat was approved by Thomas H. Carter, Commissioner of the General Land Office, on October 3, 1891, and on November 16, 1891, the account for the subdivisional survey was transmitted to the Indian Office.

T. 30 N., R. 15 E.

Field notes report:

North boundary surveyed June 16, 1851.
Resurveyed June 4-10, 1891.
East boundary surveyed November 12-15, 1852.
South boundary " November 3, 1852.
West boundary surveyed November 8-11, 1852.
Subdivisions commenced July 30, 1853.
507 Subdivisions completed September 11, 1853.

Plat reports:

North boundary surveyed June, 1851.
South, West and east boundaries surveyed November 1852.
Subdivisions surveyed July, August and September 1853.

The plat was approved by the Surveyor General February 20, 1854, and was received at this office with his letter of February 20, 1854. By letter of March 11, 1854, the receipt of the plat was acknowledged, and on that date the account for the subdivisions was submitted to the Comptroller of the Treasury for payment under report No. 3590.

T. 28 N., R. 16 E.

Field notes report:

North boundary surveyed October 20, 1852.
 East boundary no date of survey.
 South boundary no date of survey.
 West boundary surveyed October 18-20, 1852.
 Resurveyed December 9-12, 1890.
 Subdivisions commenced July 3, 1853.
 Subdivisions completed September 13, 1853.

Plat reports:

North and west boundaries surveyed October 1852.
 South boundary surveyed May 1845.
 East boundary " December 1845.
 Subdivisions surveyed July-September 1853.

The plat was approved by the Surveyor General February 20, 1854, and was received at this office with his letter of February 20, 1854. By letter of March 11 1854, the receipt of the plat was acknowledged, and on that date the account for the subdivisions was submitted to the Comptroller of the Treasury for payment under report No. 3590.

T. 29 N., R. 16 E.

Field notes report:

North boundary surveyed October 30, November 1, 1852.
 East boundary " June 4, 1839.
 South boundary " October 20, 1852.
 West boundary, no date of survey.
 Resurveyed May 28,-June 3, 1891.
 Subdivisions commenced July 13, 1853.
 Subdivisions completed September 12, 1853.

Plat reports:

North, South and west boundaries surveyed October-November 1853.

East boundary surveyed June 1839.
 Subdivisions surveyed July and September 1853.

The plat was approved by the Surveyor General February 20, 1854, and was received at this office with his letter of February 20, 1854. By letter of March 11, 1854, the receipt of the plat was acknowledged, and on that date the account for the subdivisions was submitted to the Comptroller of the Treasury for payment under report No. 3590.

T. 30 N., R. 16 E.

Field Notes report:

509 North boundary surveyed June 14-15, 1851.
 East boundary surveyed June 13, 1839.
 South boundary surveyed October 30, November 1, 1852.
 West boundary " November 12-15, 1852.
 Subdivisions commenced July 21, 1853.
 Subdivisions completed July 29, 1853.

Plat reports:

North boundary surveyed June, 1851.

South and west boundaries surveyed October-November 1852.

East boundary surveyed June 1839.

Subdivisions surveyed July 1853.

The plat was approved by the Surveyor General February 20, 1854, and was received at this office with his letter of February 20, 1854. By letter of March 11, 1854, the receipt of the plat was acknowledged, and on that date the account for the subdivisions was submitted to the Comptroller of the Treasury for payment under report 3590.

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D, Ex. D.

Copy.

Office of Indian Affairs. Received Jan. 5, 1916. 61483.

GREEN BAY, KESHENA, WISCONSIN, October 28, (1899).

Hon. Com. of Indian Affairs, Washington, D. C.

SIR: I have the honor to report that at a general council of the Menominee Indians regularly assembled at Keshena, Wis., on the 23d day of October 1899, at which a majority of the adult male members were present it was unanimously decided to request the permission of the Hon. Com'n'r of Indian Affairs to permit a delegation consisting of 2 Menominee Indians and 1 Menominee interpreter and myself to make a trip to Washington at the earliest possible date for the purpose of obtaining information in reference to the rights of the tribe to the sixteenth section and swamp lands on their reservation claimed by and patented to the State — Wis. The Indians claim that according to the terms of their treaty with the United States, that they have the same rights to the timber on these lands that they have to the timber on other lands on the reservation, which right is being denied by not allowing them to cut and sell the same under the act of June 12, 1890/.

I have explained the situation to them repeatedly to the best of my ability, but it does not satisfy them and they think if they were allowed to go to Washington and lay the matter before the Indian Office the whole thing could be settled at once.

I do not consider that anything could be accomplished by
511 a delegation visiting the Indian Office further than to stop them from continually asking to be allowed to go there.

In case a delegation is allowed to visit the Indian Office I should prefer not to make the trip as I cannot very well leave the agency and my presence would be of no benefit either to the Indians or Indian Office.

I would respectfully recommend that a delegation consisting of two Menominee Indians and one Menominee Interpreter be allowed to visit the Indian Office in the near future, the expense of said dele-

gation to be paid from tribal funds, provided the same is consistent with the rules of the Indian Office.

Very respectfully,

D. H. GEORGE,
U. S. Indian Agent.

Certified a true copy from pages 152-59, of official letter book July 1, 1899, to June 30, 1900, Records of Keshena Agency.

H. P. MARBLE,
*Assistant Superintendent, Keshena Indian
School, Keshena, Wis.*

512 D, Ex. E.

Copy.

Office of Indian Affairs. Received Jan. 5, 1916. 61483.

GREEN BAY, KESHENA, WISCONSIN, November 20, (1899).
Hon. Commissioner of Indian Affairs, Washington, D. C.

SIR: I have the honor to transmit herewith an agreement acted on and signed by a general council of the Menominee Indians at Keshena, Wis., on the 11th day of November 1899.

This council was regularly called and attended by about 110 of the adult male members of the tribe, of which number 92 voted for and signed the petition. I would respectfully state that the pine timber, about 6,000,000 feet, was removed from seven forties of this section the past winter and delivered to the Oconto Company of Oconto, Wis., under the terms of an agreement dated November 5th, 1898. Made and entered into by and between the Oconto Company of Oconto Wis. and the Hon. Commissioner of Indian Affairs for and in behalf of the United States. For your information I would state that the pine timber has all been cut and removed from the land adjoining this section, thus leaving this timber in great danger of being destroyed by fire, which may be started at any time during the summer season in the old tops of refuse timber left on the adjoining lands. There remains standing on this section an estimated amount of about 1,200,000 feet of pine timber which is much more exposed and in danger of being burned than ever before
513 owing to the work done on this section last winter.

In view of these facts if proper I would respectfully recommend that the conditions of the enclosed agreement be carried out.
Very respectfully,

D. H. GEORGE,
U. S. Indian Agent.

Certified a true copy from pages 176-78, of official letter book July 1, 1899 to June 30, 1900, records of Keshena Agency.

H. P. MARBLE,
*Assistant Superintendent, Keshena Indian
School, Keshena, Wis.*

514

D. Ex. F.

Copy.

Office of Indian Affairs. Received Jan. 5, 1916. 61483.

GREEN BAY INDIAN AGENCY,
WISCONSIN, KESHENA, January 4th, 1900.Hon. Cyrus Beede, c/o Department of the Interior, Washington,
D. C.

DEAR SIR: I received you- telegram last night upon my return from making an annuity payment to the Stockbridge Indians, and hasten to answer same.

As you are no doubt aware both of the school sections were embraced in the township and a half sold by the government and formerly comprising a part of the Stockbridge Reservation. As the Indians only have a right of occupancy on said lands it is possible that the attempt at sale, above referred to worked a forfeiture to the State of the school and swamp lands. I am not informed as to whether any of the money now on deposit to the credit of the Stockbridge Indians was derived from the sale of the two sixteen sections.

I recall to mind that one L. S. Beecher purchased Sec. 16,-28-14 from the U. S. Government; that one Weatherly purchased the same land from the State of Wisconsin and in a suit between Beecher and Weatherly the latter was successful.

I am also informed that Sec. 16-28-13 has been patented in parcels to various individuals by the State of Wisconsin. It would thus appear that the State of Wisconsin, has disposed of both of said sixteen sections subsequent to the sale of the township
515 and a half of the reservation, but I am not informed as to the manner in which the State of Wisconsin secured its title.

The above however is not supported by any records in this office and is mere hearsay. There should be a complete record of the foregoing in the Indian Office at Washington.

I regret that I am unable to give you any definite information in the matter. Shall be pleased to make inquiries among the Stockbridge Indians relative to the matter and if I can learn anything that I think might be of assistance to you will apprise you of same without delay.

Very respectfully yours,

D. H. GEORGE,
U. S. Indian Agent.

P. S. Thomas N. Chase, Esq., a former Indian Agent at this agency in his report of 1873, of said Commissioner, states that the township and a half of land was sold in January, 1873.

Certified a true copy from pp. 136-37 of misc. letter book July 3, 1900, to Aug. 12, 1902. Records of Keshena Agency.

H. P. MARBLE.
*Assistant Superintendent Keshena Indian
 School, Keshena, Wis.*

516

D. Ex. G.

Copy.

Office of Indian Affairs. Received Jan. 5, 1916. 61483.

WASHINGTON, D. C., October 10th, 1899.

Finacane and Conway, Attorneys at Law, Antigo, Wisconsin.

GENTLEMEN: I am in receipt of your letter dated September 28, 1899, in which you request to be advised respecting the rights of the Indians on the Stockbridge and Muncie Indian Reservation, to cut timber on the said reservation, "over and above the amount needed or used on their lands, which is necessary to be cut for clearing."

You also enquire whether the government expects "to prosecute either the Indians or the purchasers for the alleged timber depredations supposed to have been committed during the last logging season."

You do not state whether the timber to which you refer was cut from lands which have been approved for allotment in severalty, or from lands which are nearly claimed by individual Indians as selections for allotments.

You are informed however that in the case of approved allotments, the allottee "does not possess the right *to* cut and sell the merchantable timber, except such as it may be necessary to cut in clearing the land for agricultural or grazing purposes, or to erect suitable buildings thereon," until after the expiration of 25 years, or longer from issuance of the trust patent which reserves the title

to the United States for said period, he, receives his patent
 517 for the land, in fee, discharged of the trusteeship of the
 Government and free of all charge of incumbrance whatsoever. XIX Atty. Gen. Op. 233.

There is no law authorizing the cutting of any timber from tribal lands except such as is cut by authority of the Commissioner of Indian Affairs, and under the permission and supervision of the Agent of that Bureau.

It follows that all parties cutting timber without authority, are liable to prosecution for violation of law, and the purchasers of the timber are liable to the Government for the value thereof.

Very respectfully,

— — —, *Commissioner.*

Certified a true copy from pp. 346-345, Misc. Letter Book July 30, 1898 to June 20, 1900. Records of Keshena Agency.

H. P. MARBLE,
*Assistant Superintendent Keshena
Indian School, Keshena, Wis.*

518

D. Ex. II.

Copy.

Office of Indian Affairs. Received Jan. 5, 1916. 61483.

GREEN BAY,
KESHENA, WISCONSIN,
March 11, 1898.

Hon. Com. of Indian Affairs, Washington, D. C.

SIR: I have the honor to acknowledge the receipt of the following telegram dated March 10th inst.

"Send by first mail detailed statement showing by forty-acre tracts amount of timber cut during the winter and as soon as you can thereafter prepare and forward a similar list of all timber cut since June 12, 1890."

In reply I would respectfully state that what you ask for is an impossibility as no record has ever been kept of the amount of timber cut on each forty acre tract and I will endeavor to show why I cannot make such a report.

The pine timber on the Menominee Indian Reservation grows in detached clumps and there is no large solid bodies of timber on the Reservation and the logging operations of the Indians are much scattered in consequence. During the past season sixty three Indians entered into contracts to cut and bank logs, and they cut timber in 6 out of the 10 townships comprising the Menominee Reservation. You can see by this that the logging operations of the Indians are widely scattered, only two townships of the reservation have
519 been subdivided into forty acre tracts and only one of these townships contains any pine timber. No detailed estimate of the timber by forty acre tracts has ever been made, as there would be no object gained in having it done and the expense would be very heavy.

The Menominee Reservation has not been allotted in severalty and is held and occupied by the tribe in common. The Indian logging contractors are set at work in clumps of pine on various parts of the reservation and are compelled to cut the whole clump of timber clean before being allowed to move to another camp, but no attention is paid to lines running through the timber. It has not been the custom even among the white loggers in this vicinity to keep the scale of logs cut by forty acre tracts as it would be too expensive.

The Indian contractors on the reservation do their logging in the

same manner as their white neighbors, and their system of logging is considered equal to any logging system in the country.

In order to keep an accurate account of the timber cut from each forty acre tract, all the sections containing pine timber would have to be first surveyed, corners established and lines blazed, which would be very expensive. Then the logging contractor would have to be confined to cutting timber to one forty until he had cut all the timber on the forty, and as it is not always convenient to do this on account of the timber being divided by hills and ravines, some of it being more convenient to go in opposite directions, it would cost much more to cut and bank the timber than to allow the timber to be cut as is most convenient irrespective of forty acre lines.

An approximate estimate of the amount of timber cut on each forty acre tract during the past season can be made by surveying out each forty cut over and measuring the stumps and tops of the trees cut while they are still fresh and green, but it would take all summer to do it, and additional help would have to be employed which would make it very expensive.

(D. Ex. I.)

As timber was cut on many forties previous to the act of June 12, 1890, providing for the present system of logging and as most of the forties cut before and since that time up to the past season have been burned over, it would be an impossibility to even approximately estimate the amount of timber cut by forties from the time of the passage of the law up to the present season, to say nothing of reporting the amount cut each year by forties.

I can if you desire make a report showing the amount of timber cut during the past season on each section, but cannot, as stated, give you the amount by forty acre tracts.

The total amount of pine timber cut on the Menominee Indian Reservation since the passage of the Act of June 12th, 1890, is as follows:

	1890-91.....	22,769,560 feet.
	1891-92.....	20,000,000 "
	1892-93.....	20,000,000 "
	1893-94.....	13,380,000 "
	1894-95.....	17,000,000 "
	1895-96.....	17,000,000 "
521	1896-97.....	17,000,000 "
	1897-98.....	16,000,000 "
	A total of.....	143,049,560 feet.

When the Indians first commenced to log under the present law the timber cut was near the streams, but year by year the timber has been cut off and the distance to haul it greater and more expensive, hence the quantity banked has been reduced in order to pay the Indians more money for cutting and banking the logs. If this was not done they could not log as the expense would be too great.

Trusting I have fully explained the reason why I am unable to comply with your request, I am,
Very respectfully,

D. H. GEORGE,
U. S. Indian Agent.

Certified a true copy from official letter book August 4, 1897, to July 1, 1898, pages 333-38 Records of Keshena Agency.

H. P. MARBLE,
*Assistant Superintendant,
Keshena Indian School,
Keshena, Wis.*

522

D. Ex. J.

4-207.

"E." J. A. D.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.
WASHINGTON, D. C., June 27, 1916.

J. A. D.

I hereby certify that the annexed copy of the field notes of the survey of the line between sections 20 and 21, Township 28 north, range 16, east, Fourth Principal Meridian, Wisconsin, is a true and literal exemplification of the official field notes which are on file in this office.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington on the day and year above written.

[SEAL.]

C. M. BRUCE,
Assistant Commissioner of the General Land Office.

6-3451.

6-27 JTA.

523 Subdivision of Township 28 North of Range 16 east, of the Fourth Prin. Mer. Wisconsin.

Commenced July 3, 1853.

Finished Sept. 13, 1853.

By Nelson Fletcher, Deputy Surveyor.

Names of Assistants: Joseph Cowen, R. W. Dickerson, Chainmen; Simeon W. Cowen, Axeman and Flagman.

Chain compared with standard and adjusted thereto.

* * * * *

32.45 North on line bet. secs. 20 and 21. Var. 6° 20' East.
To a B. Oak 12 ins. in dia.

- 40.00 Set a post at the qr. sec. cor. from which a
B. oak 11 ins. in dia. brs M. 68° E. 111 lks.
B. oak 11 ins. in dia. brs S. 74° W. 105 lks.
- 44.50 To a trail, brs. N. 75° E.
- 48.08 To an Aspen 10 ins. in dia.
- 63.30 Enter Indian Corn Field, brs. E. and W.
- 70.50 Leave same, brs. East and West. Indian Blacksmith shop
and house East about 5 chains.
- 72.00 Enter wet Marsh, bears E. and W.
- 76.70 To south bank of Lake and set a Meander Post, from which
B. Pine 12 ins. in dia. brs. S. 52° W. 343 lks.
B. oak 10 ins. in dia. brs. S. 36° E. 328 lks.
- 80.00 To the cor. to Sections 16, 17, 20 and 21 in Lake.
Land rolling—openings—soil 2d rate. Timber E. and W.
oak scattering.

The bill alleges "this suit is instituted in the Supreme Court of the United States to determine the right of the complainant to what are commonly known as school lands within an Indian reservation or cession." (Par. I. p. 1).

It then sets out that enabling act of August 6, 1846, proposed to State of Wisconsin—

"That section numbered 16 in every township of public lands in State, and when said section has been sold or otherwise disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted to said State for the use of schools;" that State constitution ratified March 2, 1848, accepted said proposition and the State of Wisconsin was admitted to the Union by act of Congress approved May 29, 1848; and further avers that by virtue thereof "Wisconsin acquired the fee in section 16 in all the lands in said State belonging to the United States at the time of the admission of said State into the Union and theretofore or thereafter surveyed, and in and to all lands thereafter acquired then or thereafter surveyed." (Pars. II, III, and IV, pp. 2, 3, and 4.)

The bill then proceeds with extended quotations from the treaty of 1831 (finally proclaimed and ratified March 13, 1835) by which the boundaries of the Menominee's were defined; certain lands (not at all affecting this controversy) ceded absolutely to the United States; there was a further cession to the United States for the benefit of the New York Indians, 500,000 acres bounded on the South *and overlapping part*

of T. 28, R. 16, now in suit, and by the fourth article of which treaty it was provided as to the *unceded* lands:

"The following-described tract of land, at present owned and occupied by the Menomonee Indians, *shall be set apart and designated for their future homes, upon which their improvements as an agricultural people are to be made. Beginning on the west side of Fox River * * * ;*" and further by the sixth article "that part of it adjoining the farming country, on the west side of Fox River, will remain to them as heretofore for a hunting ground, until the President of the United States shall deem it expedient to extinguish their title * * *." (Pars. VI, XI, pp. 4, 15.)

The treaty of 1836 is then set out in extenso. By it a large tract of hitherto unceded territory of the Menominees was ceded to the United States; but the previous cession for benefit of the New York Indians was expressly excepted, and as will be seen by reference to map No. 1, the only portion of the lands involved in this suit embraced in this cession is a small strip of Ts. 28, 29, 30, R. 16, immediately northwest of and in part overlapping the lands reserved for the New York Indians. (Pars. XII, XIII, pp. 15, 19.)

Also the treaty of 1848 (made Oct. 18, 1848, and ratified Jan. 23, 1849), by which in Article II the Menominees ceded all their remaining lands in Wisconsin, including all the lands involved in this suit excepting the portion of Ts. 28, 29, 30, R. 16, heretofore

expressly mentioned, this cession to be in exchange for lands in Minnesota, described in Article III, to which it was proposed the Menominee Indians should remove (but to which in fact they have never removed); it was further agreed by Article VIII they should remain on the Wisconsin lands two years longer. Articles II and VIII are as follows:

"The said Menomonee Tribe of Indians agree to cede, and do hereby cede, sell, and relinquish to the United States, all their lands in the State of Wisconsin wherever situated." (Art. II.)

"It is agreed that the said Indians shall be permitted if they desire to do so, to remain on the lands hereby ceded for and during the period of two years from date hereof, and until the President shall notify them that the same are wanted." (Art. VIII.) (Par. XIV, pp. 20, 23.)

From paragraph 29 of plaintiff's bill and the exhibits thereto, it appears that within two years these Indians petitioned the President of the United States, representing that they had been imposed upon in the negotiation of the treaty of 1848, that they be not required to remove from their Wisconsin lands (Plaintiff's Exhibit "A," pp. 37-40), and that the time for removal was first postponed until June, 1851 (Plaintiff's Exhibit "B," p. 41), again in May of 1851 extended to June, 1852 (Plaintiff's Exhibit "I," p. 54), and once more to October, 1852 (Plaintiff's Exhibit "J," p. 55).

If further appears from the allegations of the bill and the exhibits thereto that the Menominee Indians

have never removed from the land now involved but have always been and now are in possession of the same. (Pars. XXX and XXXI, and Exhibit "F", top of p. 48.)

Also that the State of Wisconsin in 1853 assented to their occupancy (bill, par. XXI). (Par. XV, pp. 23-26.)

The bill sets out the treaty made May 12, 1854, and ratified and proclaimed August 2, 1854, whereby the Menominees retroceded to the United States the Minnesota lands (Art. I) and in consideration thereof the United States "agree to give and do hereby give to said Indians for a home, to be held as Indian lands are held," a rectangular tract twenty-four miles east and west by eighteen miles north and south out of the lands these Indians had ceded by the treaty of 1848 and which tract embraced the lands now the subject matter of this suit.

It is averred that the township lines of the tract last above named were surveyed in 1851 and 1852 (Par. XVIII, p. 26), that the section lines were run in September, 1853, and June and July, 1854. (Par. XIX.)

It is further averred that the State has conveyed the greater part of the claimed lands but "*that the State of Wisconsin is still the owner of two of said sections and claims title thereto.*" These two undisposed of sections are in no manner described or identified in the bill. (Pars. XXII and XXIII.)

The remaining paragraphs so far as they purport to contain averments of fact are that the tracts sold by the State have been assessed for taxes and State

and county taxes thereon paid (Par. XXXIV); that the claimed sections are covered with young and growing timber, increasing in value each year and not necessary to be cut to preserve it (Par. XXXV); that the Menominee Indians are engaged in manufacture and sale of lumber and have on hand several hundred million feet, which is many times more than is necessary to provide them with fuel and timber for building purposes (Pars. XXXVII, XXXVIII), and have entered upon some of the tracts owned (claimed) by the State and its grantees, and have actually cut some and threaten to cut all the timber thereon and expose it for sale after it has been sawed into lumber "without intending or contemplating the improvement of said land thereafter for any purpose" (Par. XXXIX); that the claimed sections are of great value on account of the timber thereon, and after the timber is cut will be of little or no value and that none of the Indians have ever lived on said sections (Par. XLI); that the timber on the claimed sections should, in the interest of good husbandry, be allowed to stand and will increase in value to the benefit of the owners (Par. XLII); that the lands in dispute aggregate 6,400 acres of the value of over \$100,000, and that the Department of Interior at some time in the past "paid to one Henry Sherry, a resident of Wisconsin, the sum of twenty-five thousand dollars (\$25,000) or thereabouts for trespasses committed by said Menominee Tribe of Indians upon sections 16 in said reservation tract." (Pars. L, LI.)

Paragraphs XLIII to XLIX, inclusive, deal with certain proceedings in Department of Interior and the decision of this court in *Beecher v. Wetherby* (95 U. S., 517) as complainants interpret the same.

The prayer of the bill is that the title of the State *and those claiming under it* be established and freed from all cloud and that the Secretary of the Interior and all his subordinates *and the Menominee Indians* be perpetually restrained from "*entering upon said tracts*" and cutting timber therefrom and "*from in any manner interfering with the use, possession, or enjoyment of any part of said lands, or of interfering with the exercise by your orator, or its grantees, of acts of ownership of said lands.*" (Par. LII.)

In the instant case, as in *Wisconsin v. Hitchcock* (201 U. S., 202), "*the general question is whether the State has such interest, present or prospective, in the lands in dispute as to preclude their being administered by the Secretary of the Interior for the benefit of certain Indians.*"

For the purpose of comparison and the convenience of the court we set out here that portion of the bill appearing in *Wisconsin v. Hitchcock*, *supra*, appearing in the reported case, pages 205-207:

That under the enabling act of Congress aforesaid and under the State constitution and under and in view of the cession of their lands by said Chippewa Indians, contained in said treaty of 1843, all of the lands surveyed and to be surveyed as sections 16 of the various townships within the territory covered by said

treaty vested in the State of Wisconsin, and said State of Wisconsin has at all times heretofore, since its admission to the Union, claimed a right to the fee of all lands in sections 16 in the several townships within said reservations, and, since the sectional survey thereof by the United States, has claimed the actual fee in said sections and has exercised dominion and ownership over the same and has issued sundry and divers patents to divers persons and corporations for portions thereof, sundry of which persons and corporations, grantees of the State as aforesaid, have also exercised acts of ownership thereof, and have paid taxes and made improvements thereon, and have cut and hauled timber therefrom until forbidden by orders of the defendant, Ethan Allen Hitchcock, as Secretary of the Interior of the United States, as hereinafter more particularly mentioned; that patents for all of said sections 16 within said La Pointe Reservation have heretofore been issued by said State to divers parties, and patents upon about fourteen forties of said sections 16 within said Lac du Flambeau Reservation have been issued by said State to divers parties, and there still remain about twenty-nine forties in said sections 16 within said Lac Du Flambeau Reservation, the title to which is still in and claimed by said State. That under the treaty of 1854 aforesaid and in carrying out its provisions the said Secretary of the Interior has proceeded, through the United States Indian Department, to allot from time to time to the various members of said tribes of La Pointe bands of In-

dians and to various members of the Wisconsin bands on said Lac Du Flambeau Reservation eighty acres per capita of lands within said reservations and has caused patents therefor to be issued to the members of said tribes as individuals, and such members have become full citizens of the United States, and have terminated their tribal relations, and have ceased to occupy any material part of said reservation in common. That the lands within said reservation, exclusive of the lands in section 16, are sufficient to secure eighty acres to each individual Indian who has hitherto appeared and claimed a right to an allotment. That no allotment has hitherto been allowed to any member of said tribes of Indians of any land embraced within any of said sections 16. That beginning about the year 1899, and from thence hitherto, the defendant, Ethan Allen Hitchcock, as Secretary of the Interior, and the Commissioner of the Indian Office of the United States, and divers agents and servants under them, have set up on behalf of said La Pointe and other bands of Indians, or the members thereof, a claim of interest or title in and to sections 16 aforesaid in the reservation townships aforesaid, paramount and adverse to the title of the State of Wisconsin, and have claimed and continue to claim that said sections 16 are still held by the United States in trust for said Indians to the same extent as other lands in said reserved townships, and have forbidden purchasers of such lands holding patents from the State to enter or make improvements or cut any timber thereon, and

have thereby cast a cloud upon the title of the State and its grantees to said lands, and have interfered with, and are continuing to interfere with, the use and enjoyment of the same by the owners thereof. * * * That by chap. 95 of the laws of the State of Wisconsin for the year 1903, approved April 20, 1903, the attorney general of the State of Wisconsin was duly authorized to institute proceedings in this court under the provisions of the act of Congress passed March 2, 1901, and hereinbefore referred to, to determine the rights of said State to what are commonly known as school lands within any reservation or Indian cession within said State, where any Indian tribe claims any right to or interest in said lands, or to the disposition thereof by the United States, and particularly to determine the title of the lands embraced within sections 16 in the several townships constituting the present Bad River or La Pointe and the Flambeau Indian Reservations within said State.

We deem it necessary to a completed statement of the case not only to summarize a few matters clearly appearing from the face of the bill but to set forth certain additional matters shown by the public records and laws of which the court will take judicial notice. (*Jones v. U. S.*, 137 U. S., 202; *Heath v. Wallace*, 138 U. S., 584; *Wisconsin v. Hitchcock*, 201 U. S., 203.)

First. The lands here involved have from a time whereof the memory of man runneth not to the contrary been subject to the Indian right of occupancy.

Second. The Menominee Indians have never in fact been required to remove from the lands here

involved, but by express grant from the United States these lands have been set apart for these Indians "*for a home, to be held as Indian lands are held.*"

Third. Of the original reservation, 24 x 18 miles, two townships in the southern tier (T. 28, Rs. 13 and 14) are not involved at all, having been carved out for the Stockbridge and Munsee Indians (treaty of Feb. 11, 1856, 11 Stat., 679) and by them long since abandoned (*Beecher v. Wetherby*, 95 U. S., 517); that the earliest Indian cession of any part of the lands involved (treaty of 1836, 7 Stat., 506) *included only part of the three most easterly townships* and that as to all the remainder there was no attempt at cession earlier than the treaty of 1848 (9 Stat., 952).

Fourth. As to the easterly six townships involved, the State of Wisconsin, prior to the completion and approval of survey of these lands, expressly assented to Menominees remaining thereon, the full text of the resolution of its legislature of February 1, 1853, being as follows (bill, par. 31, p. 29):

That the assent of the State of Wisconsin is hereby given to the Menomonee Nation of Indians to remain on the tracts of land set apart for them by the President of the United States on the Wolf and Oconto Rivers, and upon which they now reside, the same being within the State of Wisconsin aforesaid, and described as follows, to wit: Commencing at the southeast corner of township twenty-eight north, range nineteen, running thence west

thirty miles, thence north eighteen miles, thence east thirty miles, thence south eighteen miles to the place of beginning. (General Laws, Wis., 1853, p. 110.)

Fifth. The precise two sections which the State of Wisconsin says it has not patented and which it now claims to own have in no manner been identified and it nowhere appears in the bill within which of the townships of the reservation they lie nor at what date survey of said sections was actually approved.

Sixth. The public records in the General Land Office, in the city of Washington, disclose the situation with reference to the survey of lands in the Menominee Reservation to be as follows, and not otherwise:

Menominee lands, Wisconsin.

Township.	Range.	Date of survey in the field of township subdivisions (i. e., section lines).		Plat approved and transmitted by surveyor general.	Accounts and plats approved by commissioner.
		Commencement.	Ending.		
28	13	Oct. 15, 1853	Nov. 2, 1853	Mar. 13, 1854	Mar. 23, 1854
29	13	July 10, 1854	July 31, 1854	Oct. 11, 1854	Oct. 19, 1854
30	13	Nov. 4, 1854	Nov. 21, 1854	Feb. 6, 1855	Feb. 17, 1855
28	14	May 29, 1854	June 16, 1854	Oct. 11, 1854	Oct. 19, 1854
29	14	June 17, 1854	July 7, 1854	.....do.....	Do.
30	14	Oct. 16, 1854	Nov. 3, 1854	Feb. 6, 1855	Feb. 17, 1855
28	15	Dec. 29, 1890	Apr. 22, 1891	(1)	Aug. 28, 1891
29	15	May 28, 1891	July 2, 1891	(1)	Oct. 3, 1891
28	16	July 3, 1853	Sept. 13, 1853	Feb. 20, 1854	Mar. 11, 1854
28	16	.....do.....	.....do.....	.....do.....	Do.
29	16	July 13, 1853	Sept. 12, 1853	.....do.....	Do.
30	16	July 21, 1853	July 29, 1853	.....do.....	Do.

¹ The plats for Tps. 28 and 29 N., R. 15 E., were approved by Thomas H. Carter, Commissioner of the General Land Office, and accounts were transmitted to the Indian Office for payment. No report of the filing of these plats is noted on the tract books, and no entries have been posted in these townships.—J. W. B.

The plats are contained in plat, vol. 134 A, Wisconsin, Rm. 149.

The field notes are recorded, R. 13 in vol. 80; R. 14 in vol. 83; R. 16 in vol. 89; T. 28, R. 15, in vol. 138; T. 29, R. 15, in vol. 139; T. 30, R. 15, in vol. 86.

All of these plats (except 28 and 29, R. 15) have a red-ink notation on the margin: "Within Menominee Indian Reservation treaty May 12, 1854, vol. 10, p. 1065." Also a notation across the face (in pencil): "Menominee lands. Reserved under treaty of May 12, 1854. See dispatch May 24, 1855. No entries to be allowed in this T."

T. 28, R. 13, has the further notations: "This township was ceded by the Menominee Indians to the U. S. by art 1, treaty February 11, 1856, vol. 11, p. 679." Also: "This township was set aside for the use of the Stockbridge & Munsee tribe of Indians, act Feb. 6, 1871. See vol. 16, p. 404."

T. 28, R. 14, has the further notation: "18 sections within yellow border reserved for Stockbridge Indians. See letter to R. & R., Sept. 9, 1871; act approved Feb. 6, 1871." (Note.—Sec. 16 is *not* "within yellow border.")

Seventh. The State of Wisconsin has in no manner disclosed the form of conveyance or contract or agreement by which she undertook to transfer the remaining sections, other than the two which she still claims to own, to third persons, nor shown any contract, covenant, agreement, or warranty entitling her to maintain this suit in behalf of said grantees.

Eighth. The Congress has by act of March 28, 1908 (35 Stat., 51), entitled "An act to authorize the cutting of timber, the manufacture and sale of lumber, and the preservation of the forests on the Menominee Indian Reservation, in the State of Wisconsin," and in the Indian appropriation bill of March 3, 1911 (36 Stat., 1058-1077), by section 26 thereof, appearing at page 1076, expressly authorized and sanctioned the very acts and administrative proceedings on the part of defendant as Secretary of the Interior which are complained of in and injunctive relief against sought by the present bill.

Ninth. The lands involved in *Beecher v. Wetherby*, 95 U. S., 517, although originally a part of the Menominee Reservation, had been set apart for the use of the Stockbridge and Munsee Indians, and "*when the logs in suit were cut those tribes had removed from the land in controversy and other sections had been set apart for their occupation.*"

THE MOTION TO DISMISS.

To the bill the defendant has interposed a motion to dismiss on the ground that complainant has not shown such right, title, or interest in the land to enable it to maintain the suit; that it lacks equity; and that it shows on its face that the court has no jurisdiction over the subject matter of the suit, or, at this time, to interfere with defendant's administration of the land for the benefit of the Menominee Indians.

POINTS AND AUTHORITIES.

1. No title vested in the State of Wisconsin until the lands to which such grant might attach were identified by survey.

Gaines v. Nicholson, 9 How., 356.

Heydenfelt v. Dewey Gold & Silver Mining Co., 93 U. S., 634.

Minnesota v. Hitchcock, 185 U. S., 373.

2. School sections within an Indian reservation or a tract of land prior to survey subject to the Indian right of occupancy can at most vest in the State under school grant only the naked fee, subject in all respects to the Indian right until extinguished.

United States v. Thomas, 151 U. S., 577.

Minnesota v. Hitchcock, 185 U. S., 373.

Wisconsin v. Hitchcock, 201 U. S., 202.

And see opinion in case of *Henry Sherry*, 12 L. D., 176, quoted in plaintiff's Exhibit "F."

3. Plaintiff has not set up any contract, covenant, or warranty entitling it to maintain this suit as to the sections which it has heretofore disposed of.

17 Encyc. Pl. and Pr., 302.

32 Cyc., 1332.

ARGUMENT.

I.

No title vested in the State of Wisconsin until the lands to which such grant might attach were identified by survey.

The theory of complainant's bill is that by virtue of the blanket cession by the Menominees of all their remaining lands in Wisconsin by the

second article of the treaty of 1848 the school grant to the State of Wisconsin at once attached so as to preclude the United States from thereafter dealing with these lands. Not only is this based upon a false hypothesis—for in no event would the right of the State have attached to any particular lands until survey—but the cession upon which the State relies was not an absolute but a qualified one. The eighth article of the treaty expressly preserved to the Indians the right of occupancy “for two years from the date hereof, and until the President shall notify them that the same are wanted.” Both the right of occupancy and the actual occupancy have continued uninterruptedly until to-day, and before the cession of the 1848 treaty ever became absolute the contracting parties had substituted therefor another and different scheme (the treaty of 1854), whereby not only the original Indian right of occupancy was preserved but, as to the lands here in controversy, the United States expressly made a new and additional grant “*to said Indians for a home, to be held as Indian lands are held.*”

True it is there is a general averment in the bill that the President did notify the Menominee Tribe that the lands were wanted and ordered their removal, but from the actual facts plead and disclosed by the exhibits it is clear that no final notice or requirement of this kind was ever given or made, but, on the contrary, that after successive temporary postponements of execution of that part of the treaty of 1848, and while the Indians were still occupying all these lands, as they

had from time immemorial, and before survey thereof, not only did the State of Wisconsin expressly agree for "the Menominee Nation of Indians to remain on the tract of land set apart for them by the President of the United States on the Wolf and Oconto Rivers (embracing the easterly six townships of the lands described in plaintiff's bill), and upon which they now reside, the same being within the State of Wisconsin" (Resolution, Feb. 1, 1853, Gen. Laws, Wis., 1853, p. 110), but that the Indians and the Government by mutual consent abandoned the terms of the 1848 agreement, and prior at least to the actual survey of any but a small fraction of the sections now claimed a new and final agreement was made by which they were permanently appropriated to the use of the Indians.

And particular attention is here called to the fact that in pleading the treaty of May 12, 1854 (10 Stat., 1064), the plaintiff has omitted all reference to the preamble which shows it to be but a culmination of negotiations growing out of the Indians' dissatisfaction with the treaty of 1848, for it says, "*such articles being supplementary and amendatory to the treaty made between the United States and said tribe on the eighteenth day of October, one thousand eight hundred and forty-eight.*"

As the court may readily perceive, the lines of only a very small fraction of the sections that would be involved in this controversy were actually run out before the making of the treaty of 1854 and nothing

vested in the State under the school grant prior to approval of an identifying survey segregating each section 16. Whether either of the two sections which the State says it still owns were of those the lines of which were run and the survey approved prior to May 12, 1854, there is no means of ascertaining from the bill. This, however, is immaterial, for the State is estopped to raise the question. The only approval of any plats of survey prior to May 12, 1854, were T. 28, R. 13, and Ts. 28, 29, 30, R. 16. As to Ts. 28, 29, 30, R. 16, more than a year before, to wit, February 1, 1853, the State had assented to the very disposition it now seeks to question. Township 28, range 13, is not in dispute, being one of the two townships given to the Stockbridge and Munsee Indians and which they subsequently abandoned, and as to section 16, of which there has been no interference with any claim of the State of Wisconsin since the decision in *Beecher v. Wetherby* in 1877.

II.

School sections within an Indian reservation or a tract of land prior to survey subject to the Indian right of occupancy can at most vest in the State under school grant only the naked fee subject in all respects to the Indian right until extinguished.

Of the lands in this suit—whether the two sections claimed by the State or the sections it has attempted to convey to third persons—only a part of Ts. 28, 29, and 30, R. 16, were covered by the cession of 1836. These the State consented might be devoted to the

purpose for which they are now being used. As to the remainder, there was no attempt to cede them to the United States until the treaty of 1848, and then only in the qualified manner hereinbefore set out. That treaty by mutual consent was abandoned and by the "supplementary and amendatory" agreement of 1854 the Indians definitely and permanently established on these lands as their home. In *Wisconsin v. Hitchcock* this court in dealing with the Chippewa cession has, we think, already settled the questions in the case at bar:

The determination of the question suggested by this contention and the decision of this case is controlled by *United States v. Thomas*, 151 U. S., 577. That case involved the rights of the State of Wisconsin in and over certain lands in the La Court Orielles Reservation, as established for the benefit of the Chippewa Indians. Thomas, an Indian of the Chippewa Tribe, was indicted for the murder of another Indian of the same tribe, committed within the limits of that reservation. The evidence showed that the offense was committed upon section 16 in a township embraced in the reservation. The accused contended that by the provisions of the enabling act by which Wisconsin was admitted into the Union, section 16 in every township in that State was ceded to it for school purposes, and could not be subsequently taken by the United States as part of an Indian reservation. It appeared that previous to the alleged murder, namely in 1859, the section upon which the crime was committed, had been settled, platted and set

apart by the United States as a part and parcel of said reservation and was continuously thereafter occupied by the Indians as such, although claimed and sold by the State as and for a part of the school land ceded to it by the act of Congress. By act of Congress approved March 3, 1885 (c. 341, 23 Stat., 362, 385), it was provided that Indians committing certain crimes, among them murder, "against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." So the question was distinctly presented as to the relative rights of the State and the Indians in said section 16 within the Indian reservation on which the alleged murder was committed.

This court said: "The Indians have never been removed from the lands thus ceded (meaning by the treaty of 1842) and no Executive order has ever been made for their removal and no change has taken place in their occupancy of the lands except as provided by the treaty of September 30, 1854, 10 Stat., 1109. By that treaty the Chippewas ceded a large portion of their territory, previously retained in Wisconsin and elsewhere, and provision was made in consideration thereof for the formation of permanent reservations for their benefit, each to embrace three full townships

and their boundaries to be established under the direction of the President. One of these included the tract comprised in the La Court Orielles Reservation. *In the provision for these reservations nothing was said of the sixteenth section of any townships, and it is clear that it was not contemplated that any section should be left out of any one of them.* The land reserved was to be, as near as possible, in a compact form, except so far as the meandered lakes were concerned. When the townships composing these reservations were surveyed, the sixteenth section was already disposed of in the sense of the enabling act of 1846. It had been included within the limits of the reservations. As it will be seen by the treaty of 1842, ratified in 1843, which was previous to the enabling act, the Indians stipulated for the right of occupancy to the lands. That right of occupancy gave them the enjoyment of the lands until they were required to surrender it by the President of the United States, which requirement was never made. Whatever right the State of Wisconsin acquired by the enabling act to the sixteenth section was subordinate to this right of occupancy for which the Indians stipulated and which the United States recognized. The general rule established by the Land Department in reference to the school lands in the different States is that the title to them vests in the several States in which the land is situated, subject to any prior right of occupation by the Indians or others which the Government had stipulated to recognize."

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Again, "We therefore are of the opinion that by virtue of the treaty of 1842, *in the absence of any proof that the Chippewa Indians have surrendered their right of occupancy, the right still remains with them*, and that the title and right which the State may claim ultimately in the sixteenth section of every township for the use of schools *is subordinate to this right of occupancy of the Indians, which has, so far as the court is informed, never been released to any of their lands, except as it may be inferred from the provisions of the treaty of 1854. That treaty provided for the permanent reservations, which included the section in question. The treaty did not operate to defeat the prior right of occupancy to that particular section, but, by including it in the new reservations, made as a condition of the cession of large tracts of land in Wisconsin, continued it in force.* The State of Wisconsin, therefore, had no such control over that section or right to it as would prevent its being set apart by the United States with the consent of the Indians as a part of their permanent reservation. So, *by authority of their original right of occupancy, as well as by the fact that the section is included within the tract set aside as a portion of the permanent reservation in consideration of the cession of lands, the title never vested in the State, except as subordinate to that right of occupation of the Indians.*" (*United States v. Thomas*, 151 U. S., 577, 582, 584.)

It may now be contended in behalf of the State that, conceding our position that these lands are burdened with the Indian right, such right is, nevertheless, in the nature of a life estate, while plaintiff owns the ultimate fee. That, therefore, they should be enjoined from committing waste such as the removal of growing timber. The answer is obvious. There is no calculable limit to the time which the tribe may exist and live upon these lands. The mode and extent of their enjoyment of them is not restrained by any limitation except the judgment and discretion of that department of the Government to which Indian affairs have been committed and the acts of Congress directing that department in the premises.

III.

Plaintiff has not set up any contract, covenant, or warranty entitling it to maintain this suit as to the sections which it has heretofore disposed of.

The plaintiff has not shown any right to maintain this suit so far as the conveyed sections are concerned. One who has sold and conveyed all his title and interest in the land in controversy can not maintain the action unless, perhaps, he has warranted the title, in which case it has been held that he has sufficient interest to do so, though this also has been denied.

17 Encyc. Pl. & Pr., 302.

32 Cyc., 1332.

As pointed out, the State has not disclosed by what form of conveyance it has parted with its alleged title to the sections 16 it has assumed to convey. Para-

graph XXIV of the bill, it is true, undertakes to say that the State is legally and in duty bound to defend and protect purchasers and would be liable to them for damages for failure of title, but this is so patently a mere conclusion as to render discussion unnecessary.

IV.

In conclusion, we concede that the fourth ground of motion to dismiss is not technically correct. Under *Minnesota v. Hitchcock* and *Wisconsin v. Hitchcock*, *supra*, a justiciable controversy is presented of which by reason of the parties and the statutory consent of the United States this court has jurisdiction, but we think what was said in the last above cited case equally true here: "The State is not entitled to the relief asked nor to any order that would interfere at this time with the administration by the Interior Department of the lands in question for the benefit of the Indians for whom the * * * reservations were established."

We are, therefore, persuaded that the bill ought to be dismissed, and earnestly ask that it be so ordered.

Respectfully,

PRESTON C. WEST,
Assistant Attorney General,
 C. EDWARD WRIGHT,
Assistant Attorney,
Attorneys for Defendant.

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Supreme Court of the United States

October Term, 1913

Original No. 10.

STATE OF WISCONSIN,

vs.

FRANKLIN K. LANE,
Secretary of the Interior.

} In Equity.

BRIEF AND ARGUMENT FOR COMPLAINANT

This is an action in equity brought by the State of Wisconsin, conformably to Act of Congress, March 2, 1901, and Chapter 95 of the Laws of 1903, of the State of Wisconsin, to quiet the title of the State and its grantees and to enjoin the Secretary of the Interior of the United States from cutting the timber upon Sections 16, within the limits of the present Menominee Indian Reservation, situated in the State of Wisconsin, more particularly described as: Townships 28, 29 and 30 of Ranges 13, 14, 15 and 16, excepting Sections 16 in Township 28, Ranges 13 and 14. The latter two townships are not in controversy here, for the reason that the same at one time constituted a part of the Stockbridge Reservation and afterwards by an Act of the United States all but 18 sections of it were disposed of and no longer constituted any part of a reservation. The remaining 18 sections of the Stockbridge Reservation have since been patented to the Stockbridge Indians.

In view of the fact that this argument is made upon a motion to dismiss the bill filed by the complainant, all facts stated

therein must be taken as true, and the question is whether the allegations of the complaint in connection with the public acts and laws of which this court takes judicial notice, show that the complainant is entitled to the relief asked in the complaint or any relief.

From the complaint it appears: That in and by section 7 of an Act of Congress of the United States to enable the people of Wisconsin territory to form a constitution and state government and for the admission of such state into the union, approved August 6th, 1846, it was enacted as follows: Section 7:

“And be it further enacted that the following propositions are hereby submitted to the convention which shall assemble for the purpose of forming a constitution for the State of Wisconsin for acceptance or rejection; and if accepted by said convention and ratified by an article in said constitution, they shall be obligatory on the United States.

Section 1. That section numbered 16 in every township of the public lands in said state, and where such section has been sold or otherwise disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted to said State for the use of schools.”

That on February 1, 1848, the constitutional convention of the people of said territory, duly called in accordance with said enabling act of congress, adopted a constitution which was thereafter duly ratified by vote of the people of said territory on the 2nd day of March, 1848, in accordance with the provisions of the enabling act aforesaid and the provisions of said constitution.

This constitution in Section 2 of Article 2 adopted, ratified and confirmed the provisions of Section 7, hereinbefore set out.

Following the adoption of said constitution, the said State of Wisconsin, by an Act of Congress of the United States, approved May 29, 1848, was duly admitted into the union on

equal footing with the original states in all respects whatsoever.

The complaint shows that prior to July 9, 1832, the Menominee tribe of Indians occupied a small parcel of land situated in the State of Wisconsin, upon the shores of Lake Winnebago, but claimed as their country two large tracts of land situated in the State, to-wit: One on the East side of Green Bay, Fox Lake and Winnebago Lake as far South as Milwaukee River and as far East as Lake Michigan. The other on the West side of Fox River, described as follows:

Beginning at the mouth of Fox River; thence down the East shore of Green Bay and across its mouth so as to include all the highlands of the Grand Traverse; thence westerly on the highlands between Lake Superior and Green Bay, to the upper forks of the Menominee River; thence to the Plover Portage of the Wisconsin River; thence up the Wisconsin River to the Soft Maple River; thence to the source of the Soft Maple River; thence West to the Plume River, which falls into the Chippeway River; thence down said Plume River to its mouth; thence down the Chippeway River 30 miles; thence Easterly to the Forks of the Manoy River, which falls into the Wisconsin River; thence down the said Manoy River to its mouth; thence down the Wisconsin River to the Wisconsin Portage; thence across the said portage to the Fox River; thence down the Fox River to its mouth at Green Bay or place of beginning.

The country on the East side of Fox River, Winnebago Lake as far South as Milwaukee River was duly ceded to the United States absolutely by the treaty of 1831, proclaimed July 8, 1832.

That by virtue of said treaty a certain tract of land was set apart for the New York Indians, described as follows, to-wit:

Beginning on the West side of Fox River near the "Little Kackalin" at a point known as the "Old Mill

Dam;" thence North West 40 miles; thence North East to Oconto Creek, falling into Green Bay and Fox River to the place of beginning.

The above tract set out for the New York Indians is hereby given in detail for the reason that it is claimed in the complaint that Sections 16, in Range 16 in Townships 28, 29 and 30 were absolutely ceded by the Menominee Indians to the United States by the Treaty of 1836, proclaimed February 15th, 1837. In this treaty the grant to the New York Indians herein set out is referred to and identifies the country ceded by the latter treaty.

The complaint shows that in 1848 the Menominee Indians entered into a treaty wherein and whereby the said Indians in Article 2 of said treaty provided as follows:

"Section 2—The said Menominee tribe of Indians agree to cede, and do hereby cede, sell and relinquish to the United States, all their lands in the State of Wisconsin, wherever situated."

Article 8 of said treaty reads as follows:

"It is agreed that the said Indians shall be permitted, if they desire to do so, to remain on the lands hereby ceded, for and during the period of two years from the date hereof, and until the President shall notify them that the same are wanted."

The complaint shows and it is undisputed that the township lines of this reservation were duly surveyed by the United States in 1851 and 1852, and that the section lines of said tract of land were run by the United States in September, 1853, and June and July, 1854. Every section which is the subject of this controversy was identified by survey prior to the ratification of the Treaty of 1854, and many of them were identified by survey in September, 1853.

It appears from the complaint that the Menominee Indians were given in exchange for their lands in Wisconsin a certain country in Minnesota and large payments in cash. It further appears that the Menominee Indians, after examination of the

Minnesota territory, and after being notified and ordered to remove from their Wisconsin lands by the President of the United States, petitioned the President of the United States to allow them to remain temporarily in Wisconsin.

The complaint shows that President Filmore by an executive order notified these Indians to remove in accordance with the terms of the treaty and notified them that the lands were wanted in accordance therewith. Thereupon the Indians petitioned the President of the United States to permit them to remain temporarily. See complaint, Exhibit "A." In this petition this language is used:

"They have already been notified that the United States will expect them to remove to the new home set apart for them in this, according to the terms of said 7th article—that is, by the 18th of the approaching month of October."

At this time, which was in September, 1850, the Menominee Indians occupied the land immediately to the West of the land described as the Agricultural land, which was set out in the Treaty of 1831, and did not occupy any part of the present reservation.

On September 5th, 1850, President Filmore signed an executive order, marked Exhibit "B," in the complaint, permitting the Indians to remain temporarily until June 1st, 1851, with the distinct understanding that they do not interfere with any surveys which may be ordered, and that they must not understand this order as granting indulgence beyond that time.

Thereafter the President again extended the time within which the Indians should remove to October 1st, 1852, in accordance with Exhibits "I" and "J" attached to the complaint. And in 1853 the Indians were permitted to remove themselves from their home around Lake Winnebago to lands on the Wolf River. It was provided that they were to remain temporarily and the State of Wisconsin by a resolution under

date of February 1st, 1853, gave the assent of the State of Wisconsin to said temporary occupancy.

On August 2, 1854, the Treaty was concluded which gave to the Indians their present reservation described in this brief.

The complaint shows that the State of Wisconsin has at all times claimed Sections 16 in each of these townships as its own property under the School Grant,, and that it has exercised ownership thereover, has issued patents to various grantees for large sums of money and is still the owner of two of said sections.

It is also undisputed for the purpose of this case, that many grantees of the State of Wisconsin resold for large sums of money and that the purchasers bought in good faith, relying upon the right of the State of Wisconsin to give title, and of its grantees of again having the lawful right to transfer to them. That this belief was due in part to the many rulings of the land department, holding that the Indians had a mere right of occupancy and the State had the ultimate fee under its School Grant, and especially to the decision of the Supreme Court of the United States in the case of *Beecher vs. Wetherby*, 95 U. S. 517, and the decision of the land department, wherein Henry Sherry was paid \$25,000 for trespass committed by the Menominee Indians upon his lands, which was Section 16 of one of the Townships of this reservation.

It is undisputed that the State of Wisconsin has taxed these lands for many years and its grantees have paid these taxes to the State and County.

It also appears that the Menominee Indians have erected a large wood working plant and saw mill upon their Reservation, wherein lumber is manufactured for the markets of the world and that thirty million feet of lumber are annually cut and disposed of, and the money placed in the fund of the Menominee tribe of Indians, and that the said Indians claim, and the said Secretary of the Interior claims that the State of Wisconsin and its grantees have no right or title of any kind to

said Sections 16, and the said Indians have been directed to cut all the timber upon said Sections 16, which belonged to the State and its grantees, and to dispose of it in the markets. That the said Indians and Secretary of the Interior have actually entered upon some of said Sections and have cut valuable timber and threaten to cut all of it. That said timber is young, thrifty and growing, and that the cutting thereof will render the property remaining of little or no value. That the value of said real estate is largely in the standing timber. That said cutting by said Indians through the direction of the Secretary of the Interior is not for the purpose of improving the land thereafter, or of using the material for said Indians, but for the purpose of committing waste upon said property and deliberately defying the State of Wisconsin and the claims of its grantees.

It is alleged that unless this unlawful cutting is prohibited and the claim of the State and its grantees is established, irreparable injury will be done to the State and its grantees.

In addition to the facts stated in the complaint this court will take judicial notice of all the decisions of the Land Department affecting this reservation, and also of the fact that at the time the first claim was made by the Secretary of the Interior, that Sections 16 on this reservation did not belong to the State and its grantees, subject at most to the Indians' right of occupancy, there were no lands in the State of Wisconsin which the State could accept in lieu of said sections, and that to deprive the State and its grantees of this property under its School Grant would be in effect to take from the State in a large measure all benefits of that act.

The motion to dismiss states four reasons why this court should dismiss this bill in equity.

The first of these objections is bottomed on the theory that the State has no interest in the land and no right to object to the things which are done, or threatened to be done by the defendant.

The second and third cover the same ground, viz: That no cause of action is stated in equity.

The fourth objection is to the effect that the court has no jurisdiction to interfere with the administration by the defendant of said lands for the benefit of the Menominee Indians, who occupy with the consent of the State of Wisconsin, which consent has never been terminated. The objection that the State has no interest in the controversy, to our minds, is clearly untenable for many reasons.

1—The bill filed shows that the State of Wisconsin is still the owner of two of said Sections 16 and claims title thereto. (See Bill filed, p. 27.)

2—The State of Wisconsin has patented the other sections for a valuable consideration to some of its citizens, and owes these citizens the duty to protect them and clear up that title. This is a moral duty resting upon the State and is a sufficient right and interest within the authorities as to make the State a proper person to sue. This court has repeatedly held that the moral obligation resting upon a Government to protect its grantees in a patent and to remove clouds upon the lands conveyed thereby, is a sufficient interest to make the Government a proper party plaintiff.

U. S. vs. San Jacinto T. Co., 125 U. S. 273.

U. S. vs. Beebe, 127 U. S. 338.

Heckman vs. U. S., 224 U. S. 413.

The fourth objection to the jurisdiction of this court is not clearly put, and we are unable to understand just what is meant by it. Whether Wisconsin consented to the occupancy of these Indians or not is in no way material to the jurisdiction of this court. If the objection is to the effect that the Supreme Court of the United States has no jurisdiction over the administration of Indian Affairs by the Secretary of the Interior when this operation and administration extends to lands outside of the Reservation, and affects rights of the State of Wisconsin and its grantees, then it is so clearly untenable as to require no further argument. The original juris-

diction of this court is so plain that no time need be spent in meeting this fourth objection. The exact question was presented and decided in the case of *State of Minnesota vs. Hitchcock*, 185 U. S. 373. If it is claimed that the State has not revoked its consent to that temporary occupancy, and if failure to revoke were material, then we meet the objection by showing that the Resolution of 1853, by which the State of Wisconsin granted the Menominee Indians the right to temporarily occupy these lands, was in fact a mere license and conveyed no interest in the soil, and was terminated by the issuance of the patents herein before described to its grantees.

The whole case in a nutshell to be decided by this court is this:

Has the State of Wisconsin or its grantees any right which needs the protection of a court, to Sections 16 in the present Menominee Indian Reservation, and does the complaint and the facts of which this court takes judicial notice, establish in the State and its grantees any cause of action against the defendant, who represents the Menominee tribe of Indians?

There seems to have been no dispute as to the status of the Menominee Indians and their rights in Section 16 until the case of *Minnesota vs. Hitchcock* was reported, found in 185 U. S. 373. Until that time there was not a particle of doubt but what the most that the Indians could claim was the right of occupancy. It had been decided time and again by the land department, by opinions of the Attorney Generals, and by the Supreme Court of the United States, that on account of the peculiar situation upon this reservation, the Indians had at most a right of occupancy. After the case of *Minnesota vs. Hitchcock* was decided by this court, followed by the case of *State of Wisconsin vs. Hitchcock*, reported in 201 U. S., page 202, for the first time the claim was made that the State and its grantees had no title at all, and that the Indians could ruthlessly enter upon these lands and cut and destroy the timber.

Our position in this case is as follows:

We have one of three kinds of title.

First—The absolute fee.

Second—The ultimate fee subject to the Indians' right of occupancy.

Third—No title at all.

It never was disputed by the Indians but what we had at least title classed as number "two," until the Hitchcock cases were reported. Our claim in this case is and the State has always claimed that we have the absolute title to all of Sections 16, and certainly to Sections 16 in this Reservation, which lie within the townships of Range 16. We contend that the Sections 16 in the Townships which lie within Range 16 had been absolutely ceded by the Menominee Indians in the Treaty of 1836. This brings us to the question as to what were the boundaries of the Menominee Indian Grant at that time, and just what land did the Indians cede at that time to the Government.

The upper forks of the Menominee River referred to in the Treaty of 1836 is as near as can now be located near Crystal Falls, which lies in Township 42, Range 17 East.

In order to ascertain clearly just what was ceded by the treaty of 1836 it is important to know just what the boundary line was as claimed by the Chippewas to the North. That boundary line is set out in the treaty with the Chippewas, which was proclaimed in 1827, as follows: "From the Plover Portage of the Wisconsin, on a Northeasterly course, to a point on Wolf River, equidistant from the Ashawano and Post Lakes, of said river, thence to the Falls of the Pashaytig River of Green Bay; thence to the junction of the Neesaukootag or Burnt Wood River, with the Menominee; thence to the Big Island of the Shoskinaubic or Smooth Rock River; thence following the channel of the said river to Green Bay, which strikes between the Little and Great Bay De Noquet. Reference to modern maps shows that Post Lake is situated in the

Northern boundary line of Langlade County, and is situated in town 34, range 11 East. Shawano Lake is situated in town 27, range 16 East. A point mid-way between these two places would carry the point referred to in the Chippewa treaty to a point on Wolf River in Langlade County, town 31, range 14 East. Plover Portage is located about 3 miles South of Stevens Point and in town 23, range 7 East. By running a line from Plover Portage to a point equidistant between Post and Ashawano Lakes, practically all of the present reservation is included.

Reference to the map of David R. Burr, Draftsman to the House of Representatives, prepared in 1836, shows the grant to the New York Indians correctly, and shows where the Wolf River crosses said line, as set out in the treaty of 1836. Post Lake, however, is improperly located and should be in the latitude of $45^{\circ} 30'$. An error was made in assuming that the lake named Ashawano in the Chippewa treaty of 1827 was identical with Lake Little Butte des Mortes. Reference to this map, however, is valuable in showing that the cession to the United States in the treaty of 1836 included a large part of the present reservation and clearly all of the townships in range 16, and we feel positive that all of the townships in range 16 were absolutely ceded by that treaty. The upper forks of the Menominee River is situated $88\frac{1}{2}^{\circ}$ longitude and approximately 46° latitude.

It is difficult at this late date to locate exactly, without a resurvey, just where this line runs, but there seems to be no question but what a large part of the present reservation was absolutely ceded.

It will readily be seen just where the New York Indian grant was, and by following the boundaries of the territory ceded it will be seen that Sections 16 in the Townships in Range 16, were absolutely ceded to the Federal Government by the Treaty of 1836. If this is true, then as to these three sections there can be no question but what the State and its grantees now own absolutely the title, and that title is one of

fee simple. If this line is not correct and the boundary is further to the East, so that none of the Sections 16 in Range 16 fall within the cession, then these sections are on the same footing as the rest.

The complaint alleges that the Western boundary of the territory ceded by the Menominee Indians in 1836 was West of Sections 16 contained within the limits of Range 16 East. It is elementary that if this was in fact ceded to the Federal Government in 1836, that it became the property of the State by virtue of its School Grant, and that the State now owns it subject to any conveyance it may have made.

There is no question but what the Treaty of 1848 gave to the United States all of the Indian lands in Wisconsin belonging to the Menominee Indians, and the only limitation is found in Section 8, which reads as follows:

“It is agreed that said Indians shall be permitted, if they desire to do so, to remain on the lands hereby ceded, for and during the period of two years from the date hereof, and until the President shall notify them that the same are wanted.”

Each and every one of the opinions of the land department, and even the decision of the Supreme Court of the United States in the case of *Beecher vs. Wetherby*, 95 U. S. 517, wrongfully assume that the Indians were not notified by the President of the United States that their lands were wanted and that they were expected to remove in accordance with the terms of the Treaty. The complaint alleges that they were notified to remove, and the petition of the Indians to the Department of the Interior, Exhibit 1, expressly states that they have been notified that they were expected to comply with Section 8 and remove before the end of the two years. In this case the title which the Federal Government got by virtue of the Treaty of 1848 was the absolute fee subject to a temporary right of the Indians to remain for two years, and until the President shall notify them that the same are wanted. When the State of Wisconsin was admitted into the Union the fee to

these Sections passed to the State, subject to whatever right the Indians may have had.

In the case of *Beecher vs. Wetherby*, above cited, this language is used:

“The convention which subsequently assembled accepted the propositions, and ratified them by an article in the Constitution, embodying therein the provisions required by the Act of Congress as a condition of the grants. With that Constitution the State was admitted into the Union in May, 1848, 9 Stats. at L., 233. It was, therefore, an unalterable condition of the admission, obligatory upon the United States, that section sixteen (16) in every township of the public lands in the State, which had not been sold or otherwise disposed of, should be granted to the State for the use of schools. It matters not whether the words of the compact be considered as merely promissory on the part of the United States, and constituting only a pledge of a grant in future, or as operating to transfer the title to the State upon her acceptance of the propositions as soon as the sections could be afterwards identified by the public surveys. In either case, the lands which might be embraced within those sections were appropriated to the State. They were withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of lands in Wisconsin could be construed to embrace them, although they were not specially excepted. All that afterwards remained for the United States to do with respect to them, and all that could be legally done under the compact, was to identify the sections by appropriate surveys; or, if any further assurance of title was required, to provide for the execution of proper instruments to transfer the naked fee, or to adopt such further legislation as would accomplish that result. They could not be diverted from their appropriation to the State.

In *Cooper v. Roberts*, reported in the 18th of How., 173 (59 U. S., XV., 338), this court gave construction to a similar clause in the compact upon which the State of Michigan was admitted into the Union, and held, after full consideration, that by it the State acquired such an interest in every section sixteen that her title became perfect so soon as the section in any township was designated by the survey. 'We agree,' said the court, 'that, until the survey of the township and the designation of the specific section, the right of the State rests in compact—binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But, when the political authorities have performed this duty, the compact has an object upon which it can attach, and if there is no legal impediment, the title of the State becomes a legal title. The *jus ad rem*, by the performance of that executive act, becomes a *jus in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others.' In this case, the township embracing the land in question was surveyed in October, 1852, and was subdivided into section in May and June, 1854. With this identification of the section, the title of the State, upon the authority cited, became complete, unless there had been a sale or other disposition of the property by the United States previous to the compact with the State. No subsequent sale or other disposition as already stated, could defeat the appropriation." *Beecher vs. Wetherby*, 95 U. S. 517.

The opinion of the Assistant Attorney General Shields, to the Secretary of the Interior, dated November 10, 1890, uses this language:

"Under the rulings in *Beecher vs. Wetherby*, it would seem to be clear that the fee simple to the School Sections within the present Menominee Reservation,

had passed from the United States to the State of Wisconsin."

Exhibit "F," Bill of Complaint, p. 44.

The most advanced theory of this court with reference to unsurveyed public lands may be stated as follows:

"The right of occupancy belonging to a tribe of Indians is a sufficient incumbrance, so that lands so encumbered are not public lands within the meaning of the enabling acts, and that therefore until they do become public lands, and while they are encumbered, Congress may make such disposition of them as it sees fit. It may make a permanent reservation out of a temporary one, or it may make a military reservation or a public park. Therefore a section encumbered by the right of occupancy in a tribe of Indians is not to be classed as public lands, and until it is public lands the State has not got the ultimate fee."

This is in effect the ruling in the case of *Minnesota vs. Hitchcock*, 185 U. S. 373.

We contend that this reasoning does not apply to the case at bar for three reasons:

1—The case of *Beecher vs. Wetherby* has established a rule of property relative to this identical reservation, and that decision controls so far as this reservation is concerned.

2—The language has no application for the reason that when President Filmore notified these Indians that this land was wanted, and that they should remove in accordance with their treaty, on October 18th, 1850, these lands then and there became public lands free from every condition and restriction.

3. The lands were surveyed and sections identified before the treaty of 1854, and before the Indians came there.

The rule has become elementary that Indians, no less than the United States, are bound by the plain import of the lan-

guage of an Act of Congress and an agreement conferring substantial benefits on them.

U. S. vs. Mil. Lac. Chippewas, 229 U. S. 498.

The treaty uses plain language and provides only for an occupancy for two years from the date thereof, and until the president shall notify them that the same are wanted. It does not say until they are actually removed. It says simply "until the President shall notify them that the same are wanted."

There is no question but what the President did so notify them, and how this question could have been before this court and before the Department of the Interior repeatedly, without establishing this important fact, is beyond comprehension. All of the decisions of the Interior Department and Land Office, and even the case of Beecher vs. Wetherby, left out this important element, and expressly state that the Indians were not so notified.

Now, if it be true, and it must be so taken from the complaint, that the Indians were so notified, then it must follow that every condition of the treaty was complied with, and the United States became the owner in fee simple of all of the land in the cession of 1848, free from any claim of the Indians, and that its title was perfected on the 18th day of October, 1850. This being the last day to remove.

We wish to call the court's attention here to the fact that at this time the Indians were not located upon the lands in controversy in this action, and the complaint alleges that they were not upon any part of their present reservation. They occupied a small part of their former reservation, near land which had been designated by the Treaty of 1831 as Agricultural Land, and it was this tract for which they petitioned President Filmore for permission to occupy. It was to this location that the President's orders, contained in the bill filed, marked Exhibits "B," "I" and "J," related. By the President's orders they were permitted to remain at the location where they were, and were required as a condition to so remaining to not interfere with the surveys. At that time the

lands around Lake Winnebago were being surveyed, and they were allowed to remain there until fully surveyed. They were then allowed to remove to another part of the vast domain, which they had ceded, but never occupied. It was in 1853 that they moved to their present reservation. Could it be said that the lands around Lake Winnebago were subject to the Indian right of occupancy after the surveys were completed and they moved away? Could the Indians acquire a right on their present reservation by temporarily moving there? They were not in possession of these lands until three years after they were notified that the lands were wanted. The present reservation is approximately 50 miles from where they were when the petition was directed to the President for permission to remain longer than October 18, 1850. The objection raised by the Indians was the moving in October to a new home. They had never lived upon the present reservation and had never occupied it, and we contend that the only land they had any claim to whatever was the land around Lake Winnebago, which they were actually occupying. How the Indians could shift this right of occupancy from one part of the State to another and encumber the lands which had been given to the State, which had in fact been surveyed, is more than we can comprehend. We wish to call the court's attention to Exhibit "I," which relates to the third extension of time allowed the Indians, and particularly to that part which reads as follows:

"The time limited by the President for the removal of these Indians will expire on the first day of June ensuing, and as weighty reasons exist why they should not be removed at that time, I recommend that an order be issued by the President permitting them to remain until the first day of June, 1852, on the condition that they do not interfere with the surveys, and with the distinct understanding that this extension of time is an act of favor, and that they are still subject to removal at the discretion of the President."

Now, this language makes it plain that the Indians had no title of any kind to the lands they occupied, much less to the

lands they did not occupy. The fact that surveys were being made and were in fact made, shows that the Federal Government never for a moment conceded that the Indians had any title to the lands they occupied, much less to the lands they did not occupy, which constitute the present reservation. Indian reservations are not as a rule surveyed. The surveys here show unmistakably that the Federal Government considered, and the Indians considered, that all title to all lands in Wisconsin belonged to the United States free from any claim of the Indians after October 18, 1850.

Why was the consent of the State of Wisconsin obtained to permit these Indians to occupy these lands temporarily, if the lands constituting Sections 16 did not belong to the State? The Treaty of May, 1854, proclaimed August 2nd, 1854, establishes the present reservation as a permanent home for these Indians. It has been repeatedly held that such a grant to the Indians gives them the mere right of occupancy. In order to sustain the claims of the defendant in this action it is necessary to hold that the Indians had that right prior to 1854. If this is true it must follow that part of the treaty of 1854 is surplusage. Congress can hardly be thought to have made a Grant to these Indians as a permanent home, if they already had such a permanent home.

All of the authorities agree that the State of Wisconsin has the ultimate fee to Sections 16 within this Reservation, and these decisions were rendered without knowing that the President of the United States had notified these Indians to remove. Without such an order of removal it was considered that the Indians had such an interest under the Treaty of 1848 as to give them a right of occupancy. It is upon this theory that all of these cases were decided. The following language used by Justice Lamar, while Secretary of the Interior, states clearly the rights of the State under the School Law Grant:

“The true theory is this: That where the fee is in the United States at the date of survey, and the land is so encumbered that full and complete title, and right of possession cannot then vest in the State, the State

may, if it so desires, elect to take equivalent lands in fulfillment of the compact, or it may wait until the right and title, or possession unite in the Government, and then satisfy its grant by taking the lands specifically granted."

This view he considered as fully sustained by the decisions of the courts and the opinions of the Attorney General, and cited in support of it *Cooper vs. Roberts*, 18 How. 173; 3 Ops. Atty. Gen. 56; 8 Ops. Atty. Gen. 255; 9 Ops. Atty. Gen. 346; 10 Ops. Atty. Gen. 430; *Ham vs. Missouri*, 18 How. 126.

This language is quoted approvingly in the case of *Minnesota vs. Hitchcock*, 185 U. S. 373.

Taking this as a foundation we ask, did not the United States completely extinguish the Indian title and survey these lands prior to the Treaty of 1854? The Treaty of 1848 ceded all of these lands to the United States and provided that the Indians be allowed to remain for two years, and until notified that the lands were wanted. The Indians were notified that they were expected to remove to their new home in Minnesota. The Government surveyed these lands and identified each Section by a survey prior to the Treaty of 1854. What more could the Government have done to extinguish the Indian title? The only remaining thing it could have done was to have taken the Indians bodily and moved them off. They did not occupy any part of the present reservation, and so even the latter alternative could not have been resorted to. The State of Wisconsin has always claimed these lands, and the title was completely vested in the Federal Government, so that in the event that it should be held that these were not public lands, and that the case of *Beecher vs. Wetherby* was wrongfully decided, still we say these lands became public lands October 18th, 1850, and under the authorities passed to the State at that time under its School Grant.

The resolution of the State of Wisconsin allowing a temporary occupancy could grant nothing more nor less than a license and can be construed in no other light. It expressly

provides for a temporary occupancy. Subsequently thereto the State issued patents in fee, and now claims that the Indians have no title and in this suit alleges that its title be quieted as against any of the claims of these Indians. It certainly cannot be claimed with any effect to this court, that the resolution permitting the Indians to temporarily occupy this land has now any effect whatever upon the right of the State or its grantees.

The case of *United States vs. Thomas*, reported in 151 U. S. 577, is the basis for the opinion of *Wisconsin vs. Hitchcock*, reported in 26 Supreme Court Reporter, page 498. Both of these cases sustain the right of the complainant in this action. In the *Thomas* case this language is used:

“We therefore are of the opinion that by virtue of the treaty of 1842, in the absence of any proof that the Chippewa Indians have surrendered their right of occupancy, the right still remains with them, and that the title and right which the state may claim ultimately to the sixteenth section of every township for the use of schools is subordinate to this right of occupancy of the Indians, which has, so far as the court is informed, never been released to any of their lands, except as it may be inferred from the provisions of the treaty of 1854. That treaty provided for permanent reservations, which included the section in question. The treaty did not operate to defeat the prior right of occupancy to that particular section, but, by including it in the new reservations, made as a condition of the cession of large tracts of land in Wisconsin, continued it in force. The State of Wisconsin, therefore, had no such control over that section or right to it as would prevent it being set apart by the United States, with consent of the Indians, as a part of their permanent reservation. So, by authority of their original right of occupancy, as well as by the fact that the section is included within the tract set aside as a portion of the permanent reservation in consideration of the cession of lands, the title

never vested in the state, except as subordinate to that right of occupancy of the Indians."

United States vs. Thomas, Vol. 14 Sup. Ct. Rep. 426.

We wish to call the court's attention to the important fact in the Thomas case and upon which the whole decision rests, viz: That the Indians stipulated for the right of hunting and fishing until they were ordered to remove and that no executive order was ever made. In the case at bar this executive order was made. Even in the Thomas case there is no contention made, but what the State of Wisconsin held the fee subject to the Indians' right of occupancy.

The right of a State to wait until the extinguishment of an encumbrance of this kind and then take Section 16 is admitted by practically every decision of this court, and of the Land Department. Even Congress has seen fit to legislate on this matter clearly recognizing this rule. The Act referred to is the Act of February 28, 1891 (26 Stats. 796).

The part of that Act which affects this question reads as follows:

"And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory, where sections sixteen or thirty-six are mineral land, or are included within any Indian, military or other reservation, or are otherwise disposed of by the United States: Provided, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory, to compensate deficiencies for school purposes where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by

reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations: Provided, however, That nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing."

This branch of the case we have argued in an attempt to show that the State of Wisconsin and its grantees are the owners of the fee simple to Sections 16 on this Reservation.

In case this court should determine that the State of Wisconsin has the ultimate fee subject to the Indians' right of occupancy and this must follow, unless the court holds that the State has fee simple, then it is important to determine just what rights the Indians have. Congress has not seen fit to alter the purpose of this Reservation, and so has not in any way affected the State's ultimate fee, and the Indians now have only the right of occupancy. The right of occupancy is as sacred, no doubt, as the right to the fee, but that right of occupancy does not give the Indians the right to commit waste at pleasure. The exact nature of the Indians' title where similar language was used was decided in the case of *United States vs. Cook*, 19 Wall. 591. It was there held that the Indians

have only the right of occupancy. This decision relates to this Reservation and the following language is used:

"The right of the Indians in the land from which the logs were taken was that of occupancy alone. They had no power of alienation except to the United States. The fee was in the United States subject only to this right of occupancy. This is the title by which other Indians hold their lands. It was so decided by this court as early as 1823, in *Johnson vs. McIntosh*, 8 Wheat. 574. The authority of that case has never been doubted. 1 Kent. 257; *Worcester vs. Ga.*, 6 Peters 580. The rights of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy. *Cherokee Nation vs. Ga.*, 5 Pet. 48. The possession when abandoned by the Indians attaches itself to the fee without further grant."

Cherokee Nation vs. Ga., 5 Pet. 17.

This right of use and occupancy by the Indians is unlimited. They may exercise it at their discretion. If the lands in a state of nature are not in a condition for profitable use, they may be made so. If desired for the purpose of agriculture, they may be cleared of their timber to such an extent as may be reasonable under the circumstances. The timber taken off by the Indians in such clearing may be sold by them. But to justify any cutting of the timber, except for use upon the premises, as timber or its products, it must be done in good faith for the improvement of the land. The improvement must be the principal thing and the cutting of the timber the incident only. Any cutting beyond this would be waste and unauthorized.

The timber while standing, is a part of the realty, and can only be sold as the land could be. The land cannot be sold by the Indians, and consequently the timber, until rightfully severed, cannot be. It can be rightfully severed for the purpose of improving the land, or the better adapting it to convenient occupation, but for no other purpose. When rightfully severed it is no longer a part of the land, and there is no restric-

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tion upon its sale. Its severance under such circumstances is only a legitimate use of the land. In theory at least, the land is better and more valuable with the timber off than with it on. It has been improved by the removal. If the timber should be severed for the purposes of sale alone, in other words, if the cutting of the timber was the principal thing and not the incident, then the cutting would be wrongful, and the timber when cut, become the absolute property of the United States.

These are familiar principles in this country, as well settled, as applicable to tenants for life and remainder-men. But a tenant for life has all the right of occupancy in the lands of a remainderman. The Indians have the same rights in the lands of their Reservation. What a tenant for life may do upon the lands of a remainder-man the Indians may do upon their reservation, but no more."

U. S. vs. Cook, 19 Wal. 591.

These authorities hold as plainly as any can hold that the fee of the Menominee Indian Reservation belongs to the United States. Of course, this does not relate to Section 16, since that was not involved. By force of reasoning in Beecher vs. Wetherby and U. S. vs. Cook, herein cited, it must follow that the State has the ultimate fee, and that it has parted in some instances with a part of it to its grantees. That position places the Indian as a tenant for life, and as such they have no right to cut the timber upon these lands and appropriate the timber and proceeds to their own use, with no idea or intention of improving the land.

In case this court holds that the State of Wisconsin and its grantees have not the absolute title, but only the ultimate fee subject to the Indians' right of occupancy, then it must follow that the Indians are threatening or committing waste upon these lands, and should be enjoined.

The rule of property established by the case of Beecher vs. Wetherby, 95 U. S. 517, should not be altered. On the strength of this decision the land office rendered many decisions, in each and every one of which it was held that the

State of Wisconsin holds the ultimate fee to the School Lands, in this Reservation, subject only to the Indians' right of occupancy. That the United States has no interest in these lands other than to protect the Indians in the enjoyment of that right. Congress has no right to make a different disposition of these lands, to create a military reservation or park out of them, for the reason that this decision and the decisions of the land office have fixed the status of these lands. In those decisions these Sections 16 upon this Reservation were designated as public lands, and within the School Grant, but that all that the State must do is to await the extinguishment of the Indian right of occupancy. To apply the rule laid down in the case of *Minnesota vs. Hitchcock*, 185 U. S. 373, in which there appeared many distinguishing facts, and to hold that these sections were not public lands, would be overruling the case of *Beecher vs. Wetherby*, and all of the decisions of the land department. This would infringe upon the rights of innocent persons, who have acquired title relying upon the decision of this court, and the decision of the land department.

In the case of *Minnesota vs. Hitchcock*, great stress is laid upon the decisions of the Land Department, and these are frequently quoted by this court with approval. Surely all persons would be justified in accepting the decisions of the Land Office and the Supreme Court decision in the case of *Beecher vs. Wetherby* as the law of the land. Many of the grantees of the State purchased from the State, and from each other, since the case of *Beecher vs. Wetherby*. We contend that the decision of *Beecher vs. Wetherby* and the opinions of the Attorney General, and the decisions of the Land Department, each and every one give to the State of Wisconsin the ultimate fee, subject only to the Indians' right of occupancy.

As before stated, these opinions all were based on the theory that the Indians had never been ordered to remove by President Filmore. As a matter of fact that order was made, and with that in the case it makes it plain that the State and its grantees are entitled to the fee simple title. They certainly

are entitled to the ultimate fee given them by all of the authorities, subject only to the Indians' right of occupancy.

The State of Wisconsin has always claimed the absolute title to these sections. It was with some surprise to the State that the rule was announced in *Beecher vs. Wetherby*, 95 U. S. 517, that the Indians had a right of occupancy in these sections. Many patents had been issued by the State prior to the decision in the case of *Beecher vs. Wetherby*, and no question was raised but what the State held the absolute title. As hereinbefore set out, the case of *Beecher vs. Wetherby*, which holds plainly that the State has the ultimate fee, was not presented to the court on the theory that an order of removal had been made by the President of the United States and that a large part was ceded to United States in 1836. Had this been presented to this court there can be no doubt but what this court would have held that the Indians did not even have a right of occupancy in these lands. The fact that Congress set out for a permanent home, a tract of land without exception which included sections 16, did not indicate that Congress made claim to sections 16. The Indians would acquire no title unless the United States had title to give, and the United States had no title to sections 16, since it had parted with that title to the State. All that the Indians would acquire by virtue of the treaty of 1854 was the right of occupancy within the defined territory, excluding sections 16.

Great stress is always laid by the Government and the Indians upon the fact that the State may elect to take other lands in lieu of sections 16 where such sections had been disposed of prior to the school grant. From this it is argued with great force that the State cannot be injured. It may take other lands in case these lands are given to the Indians and in that way no hardship will be done. In many instances this has had great weight with this court. In the case at bar we wish to call the court's attention to the fact that Wisconsin cannot take, if it would, other lands, and never could have taken other lands since the Department of the Interior first made claim to sections 16 in this reservation. In case the claim of the State

and its grantees should be denied in this litigation the State will lose all benefits of the school grant so far as the sections falling within this reservation are concerned. Its grantees will suffer. It is more important that the title of the State to these lands be confirmed and quieted than it is to reverse the rulings made by this court and the land department. To do this at this late day will be an injustice to the State and its grantees.

No hardship will be done the Indians in case this court should hold that the absolute title to these lands is in the State and its grantees. Congress has repeatedly remunerated Indian tribes under similar circumstances. Besides the Indians are not entitled to remuneration, since it was never intended by Congress that the State should lose its right to sections 16 and that the Indians should acquire that right by the treaty of 1854.

Since the above brief was written, the defendant has served his brief and the following is added as a reply thereto:

The fourth ground of motion to dismiss, made by the defendant herein, is conceded by his brief filed, to be untenable. The identical question has been decided repeatedly by this court, and is no longer open for argument. The concession of counsel removes this objection from the list presented.

The brief of the defendant concedes that a part of the present reservation was absolutely ceded by the Menominee Indians in the treaty of 1876. It is conceded that a large part of towns 28, 29, 30, of Range 16, were absolutely ceded to the United States by the treaty of 1836, but it is claimed by counsel for the defendant that these townships were included in the grant to the New York Indians and by the treaty of 1836 were excepted from the concession to the United States. The grant to the New York Indians probably did overlap some of the towns in range 16, and if it be conceded that it overlapped all of the three towns in range 16, then we have at best this situation: The New York Indians, by the reservation in the

treaty of 1836 and by the provisions thereof, became the owners of towns 28, 29, 30 of range 16. By the provisions of the treaty they had a mere right of occupancy and the fee was in the United States. It appears that the treaty of 1836 provided that the New York Indians occupy this tract and that it could be declared forfeited by the President of the United States for failure to occupy. It is certain, therefore, that if the New York grant did overlap the present Menominee Reservation, as counsel concedes, then the New York Indians became the possessors of this tract until their right of possession was vested in the United States.

It appears without dispute that this land was not occupied by the New York Indians, and that at Buffalo Creek, in the State of New York, on the 15th day of January, in the year 1838, a treaty was made and concluded, which was ratified in 1840, article one, which reads as follows:

“Article 1—The several tribes of New York Indians, the names of whose chiefs, head-men, warriors and representatives are hereunto annexed, in consideration of the premises above recited, and the covenants herein-after contained, to be performed on the part of the United States, hereby cede and relinquish to the United States all their right, title and interest to the lands secured to them at Green Bay by the Menominee treaty of 1831, excepting the following tract, on which a part of the New York Indians now reside: Beginning at the Southwesterly corner of the French grants at Green Bay and running thence Southwardly to a point on a line to be run from the little Cocalin, parallel to a line of the French grants, and six miles from Fox River; from thence, on said parallel line, northwardly six miles; from thence easterly to a point on the Northeast line of the Indian lands, and being at right angles to the same.”

It will be seen, therefore, that all of the present reservation contained in range 16, which overlapped the New York grant, was absolutely ceded by the Menominees and the New York

Indians to the United States in 1840. From this it follows that at least some of sections 16 in each of towns 28, 29 and 30, of range 16, were public lands of the United States, free from the control or right of any Indian prior to the enabling act admitting Wisconsin into the union. From this it must follow that as to these sections there can be no question but what the state became the owner under its school grant.

Contention is made by the attorney for the defendant in his brief that the State of Wisconsin assented to the present reservation and by some mysterious manner is now estopped to question the Indian's right of possession. Counsel has evidently overlooked the Wisconsin Constitution in making this argument, and has failed to notice that a resolution of the State of Wisconsin cannot by the terms of our constitution give title to this land to anybody. Our constitution provides in Article 4, Section 17, as follows:

“The style of the laws of the state shall be: ‘The people of the State of Wisconsin represented in the Senate and Assembly, do enact as follows: No law shall be enacted except by bill.’ ”

Clearly no claim can be made that the resolution of 1853 became a law of the State of Wisconsin.

A resolution is not a statute, but merely a form in which the legislative body expresses an opinion. A resolution is of a special and temporary character.

“A legislative body may by a resolution express an opinion, may govern its own procedure within the limitations imposed on it by its constitution or authority, and, in case it have ministerial functions, may direct their performance, but it cannot adopt that mode of procedure in making laws, where the power which created it has commanded that it shall legislate in a different form.”

City of San Antonio vs. Mickeljohn, 89 Tex. 79;

City of Patterson vs. Barnet, 46 N. J. Law 62.

Counsel for defendant lays great stress upon the Resolution of 1853 and tries to read into that a grant by the State of Wisconsin to the Menominee Indians of School Section 16, and a forfeiture of our school grant within the limits of this reservation. The resolution is of very little force when it is considered that:

First—It is not a law of the state within the meaning of our constitution.

Second—That resolution fixed the territory occupied by the Indians and to which the consent of the state is attempted to be given as follows: "Beginning at the South East corner of Township 28, Range 19, thence West 30 miles, North 18 miles, East 30 miles, South 18 miles to the place of beginning."

Third—At this time the Indians were located only temporarily upon this land, and to construe the state's consent to a temporary occupancy into a permanent grant is unfair to the state and its people.

Fourth—The State of Wisconsin by a law could not consent to surrender section 16 to the United States.

Under the **first** sub-division enough has been said to show that the Resolution of 1853 is not a law of the State of Wisconsin.

Under the **second** sub-division it is plain that the consent of the State of Wisconsin, even by a resolution, was never given to those parts of the present reservation included in townships 28, 29 and 30, ranges 13 and 14.

Under the **third** sub-division the court will also take judicial notice of the fact that in 1853 the Menominee Indians occupied some of these lands only temporarily, having been moved from the mouth of the Wolf River, so as to throw that territory open to settlers, and so as not to have any interference on the part of the Indians. It is plain that it was to this temporary occupancy that the state's resolution was directed.

With reference to the **fourth** proposition, even if the State of Wisconsin had by a law passed after the treaty of 1854, attempted to grant school sections 16 to the United States, still,

the act would be nugatory. If a regularly passed statute enacted after a permanent reservation had been created, and for the express purpose of forfeiting the state's land is nugatory, how much more so must a simple resolution be, passed before the creation of the reservation? Our constitution provides in Sections 7 and 8 as follows:

“Article 10—Section 7: The Secretary of the State, Treasurer and Attorney General shall constitute a board of commissioners for the sale of the school and university lands, and for the investment of the funds arising therefrom. Any two of said commissioners shall be a quorum for the transaction of all business pertaining to the duties of their office.”

Section 8: “Provision shall be made by law for the sale of all school and university lands after they shall have been appraised; and when any portion of such lands shall be sold and the purchase-money shall not be paid at the time of the sale, the commissioners shall take security by mortgage upon the land sold for the sum remaining unpaid, with seven per cent. interest thereon, payable annually at the office of the treasurer. The commissioners shall be authorized to execute a good and sufficient conveyance to all purchasers of such lands, and to discharge any mortgages taken as security, when the sum due thereon shall have been paid. The commissioners shall have power to withhold from sale any portion of such lands when they shall deem it expedient, and shall invest all moneys arising from the sale of such lands, as well as all other university and school funds, in such manner as the legislature shall provide, and shall give such security for the faithful performance of their duties as may be required by law.”

When Wisconsin was admitted into the union and this constitution was ratified by Congress, without question it bound the United States to such a construction of this constitution, as to carry out every one of the provisions of it. This consti-

tution provides as plainly as can be that the Commissioners of public lands have complete control of these lands, and alone can make conveyance of them. These lands are held in trust for the schools and can be disposed of in but one way, and that must be as prescribed by law and this constitution.

In the case of *State ex rel Sweet vs. Cunningham*, 88 Wis. 81, it appears that the State of Wisconsin, by Chapter 324, Laws of 1878, had withdrawn from sale certain school lands and reserved them for a state park. It was held that the Legislature of the State of Wisconsin could not divert school lands for any other purposes, nor could it set them apart for a state park, and that it could not withhold these lands from sale. This language is used:

“These lands mostly belong to the school fund of the state. The school fund is a trust fund, and is placed by the Constitution beyond the power of the Legislature to divert it to any other use than the support of the schools of the state. It could not set them, or any of them, apart for a state park. Const. Wis. art. X, sec. 2; *Lynch vs. The Economy*, 27 Wis. 69; *People vs. Allen*, 42 N. Y. 404. Neither could it withhold these lands from sale. That power is confided to the discretion of the commissioners of public lands by the constitution and lies in no other office or body. Const. Wis. art. X, sec. 8; *State ex rel Crawford vs. Hastings*, 10 Wis. 525; *McCabe vs. Mazzuchelli*, 13 Wis. 478; *State ex rel Kennedy vs. Brunst*, 26 Wis. 412.”

Also see Warvelle on Abstracts, Second Ed., page 165, where this language is used:

“In Wisconsin, the commissioners of school and university lands are alone authorized to convey such lands, and that power can not be transferred to others; hence a patent issued by the Governor and Secretary of State, although in conformity to the general statute regulating patents, would be void and inoperative to pass the title to that particular class of lands.”

Now the above authority from the highest court of the state in which these lands are situated, shows without question that the resolution of the State of Wisconsin in 1853 could not in any manner affect the questions considered in this case. The legislaturer could not by any manner or method grant school sections 16 to the United States, or in any manner lessen the interest of the state of Wisconsin therein.

Considerable stress has been laid upon the lack of interest in the state to bring this suit. It is alleged in the complaint, paragraph 23: "The state of Wisconsin is still the owner of two of said sections and claims title thereto." And in paragraph 24: "The State of Wisconsin sold the remaining section 16 to innocent purchasers for value and accepted value therefor, and it is legally and in duty bound to defend and protect these purchasers and their title to said lands, and would be liable to them for damages that they might sustain by reason of any failure of title."

Counsel for the defendant attempts to argue that while the state still claims two of these sections, still, because it has failed to designate precisely which two it still owns that therefore it fails to state sufficient interest, and that the allegations of the complaint showing sales to innocent purchasers and a moral duty, as well as legal duty to protect these purchasers resting upon the state, are mere conclusions of law and together fail to show a cause of action in favor of the state.

There are several answers to the argument of the defendant. In the first place this court has held repeatedly that the United States, although it has conveyed lands to another, still retains sufficient interest to maintain a suit to quiet his title and may bring a suit to remove a fraudulent grant.

U. S. vs. San Jacinto T. Co., 125 U. S. 273.

U. S. vs. Beebe, 127 U. S. 338.

Heckmna vs. U. S., 224 U. S. 413.

In the case of United States vs. Beebe, 127 U. S. 342, this language is used:

“The public domain is held by the Government as part of its trust. The Government is charged with the duty and clothed with the power to protect it from trespass and unlawful appropriation, and under certain circumstances, to invest the individual citizen with the sole possession of the title which had till then been common to all the people as the beneficiaries of the trust. If a patent is wrongfully issued to one individual, which should have been issued to another, or if two patents for the same land have been issued to two different individuals, it may properly be left to the individuals to settle, by personal litigation, the question of right in which they alone are interested. But if it should come to the knowledge of the Government that a patent has been fraudulently obtained, and that such fraudulent patent, if allowed to stand, would work prejudice to the interests or rights of the United States, or would prevent the Government from the fulfilling an obligation incurred by it, either to the public or to an individual, which personal litigation could not remedy, there would be an occasion which would make it the duty of the Government to institute judicial proceedings, to vacate such patent.

In the case before us the bill avers that the patents whose cancellation is asked for, were obtained by fraud and imposition on the part of the patentee, Beebe. It asserts that there exists, on the part of the United States, an obligation to issue patents to the rightful owners of the lands described in the bill; that they cannot perform this obligation until these fraudulent patents are annulled and that they therefore bring this suit to annul these fraudulent instruments whose existence renders the United States incapable of fulfilling their said prior obligation.

The court below held that the bill in this case having been filed on the recommendation of the Secretary of the Interior, for the declared purpose of having the

questions which were being pressed upon the Land Department, in connection with the claims of the Philbrook heirs against the Government, determined by the judicial department, which claims were unsettled and important, the appeal to the court was proper. In this we think the learned judge is in full accord with the principal laid down by Mr. Justice Miller in the San Jacinto case, and within the following language of the court in *Hughes v. The United States*, 4 Wall. 232, 236, which was a suit brought in the name of the United States to set aside a patent for the benefit of a private citizen entitled to the land covered by said patent. Mr. Justice Field, who delivered the opinion of the court, speaking of the patent to Hughes, said: 'Whether regarded in that aspect or as a void instrument, issued without authority, it *prima facie* passed the title, and therefore it was the plain duty of the United States to seek to vacate and annul the instrument to the end that their previous engagement be fulfilled by the transfer of a clear title, the one intended for the purchaser by the act of Congress.' Unless, therefore, it appears on the face of the bill that the claim set up has no equity, or that there are valid defences to the suit, the jurisdiction of the court to entertain it cannot be denied."

In the instant case it will readily be seen that the state is the only practical party plaintiff, and that if the individual grantees were compelled to quiet their own title that redress would be difficult, if not impossible. No reason is perceived why the same rule applied to the United States should not be applied to the state, who issues its patents to its land to grantees for value. We think it is clear that the suit is properly maintainable by the State of Wisconsin, especially in view of the fact that the state owns two of the sections involved.

Again, the fact that the state has failed to allege which two of these sections it claims, if it otherwise could not maintain the suit, would at most make the complaint open to a mo-

tion to make it more definite and certain. It would not be demurable.

The allegations show interest, legal liability and moral duty on behalf of the state and are more than legal conclusions, and in this day of liberality in pleadings should be taken at their face value. An allegation of this kind is sufficient as against a demurrer, as shown by the following quotation taken from the case of *Curtiss vs. Livingston* (Minn.) 31 N. W. 357:

"It is urged that the clause we have quoted from the complaint is a statement of a conclusion of law, and not an allegation of fact. It is, for the purpose of pleading, rather a statement of an ultimate fact, or a conclusion of fact, based on or arrived at by several minor facts, and the rules of law applicable to them. This, to avoid prolixity, is sometimes not only permissible, but necessary, in pleading. Thus, in ejectment, it is sufficient for plaintiff to allege that he is the owner and entitled to the possession, and that the land is wrongfully withheld, without alleging in detail the particular facts on which his claim of title is based,—*McClane v. White*, 5 Minn. 178, (Gil. 139); *Wells v. Masterson*, 6 Minn. 566, (Gil. 401); *Buckholz v. Grant*, 15 Minn. 406, (Gil. 329);—also that a mortgage was 'duly foreclosed,' without alleging particulars,—*Pinney v. Fridley*, 9 Minn. 34, (Gil. 23);—also, in an action to enforce a lien for taxes passing under the statute to a purchaser at a void tax sale, that the taxes were "duly levied and assessed,"—*Webb v. Bidwell*, 15 Minn. 479, (Gil. 394). So an allegation that a party 'conveyed,' or that he 'contracted' or 'agreed,' without detailing the particular acts which it is claimed resulted as a conveyance, contract, or agreement, must usually be sufficient in pleading. Where the allegation is so indefinite that the opposite party may not be apprised of what is claimed, the court may, perhaps, in a motion to make more definite and certain, require a more full and detailed statement; but, as against a demurrer, a general allegation

of an ultimate fact or conclusion of fact is sufficient."

Travellers Ins. Co. vs. Hallauer, 131 Wis. 371.

And the Supreme Court of the United States, in promulgating rules for courts of equities for the United States, has abolished the technical forms of pleadings in equity. Rule 18, reads as follows:

"Unless otherwise prescribed by statute or these rules, the technical forms of pleadings in equity are abolished."

The tendency of the times is to abolish all technicalities in pleadings, as well as in the trial of action. Giving this complaint the same liberal construction that should be accorded it under the liberal rules now in force, there seems to be no question but what the state has shown sufficient interest to maintain this suit.

The counsel for the defendant concedes, as he must, that a great many of the section lines within the present reservation were actually run before May 12th, 1854. The section lines which were actually run before this date, and approved before this date, are those of township 28, Range 13; of township 30, Range 15; of township 28, Range 16; Township 29, Range 16, and Township 30, Range 16. These were not only surveyed, but were actually approved before May 12th, 1854, being the date of the signing by the Indians, of the treaty of that year. As to those sections they were actually identified before the signing of the treaty of 1854.

It is also conceded that this treaty was ratified the 2nd day of August, 1854. Between the date of signing the treaty and its ratification, Town 29, Range 13 was surveyed and run on the ground, as was town 28, range 14; town 29, range 14. It then becomes material to inquire when this treaty, as against the State of Wisconsin, went into effect. It is the rule between the parties to treaty that the signing of the treaty is the date which fixes all of the rights of the parties to it. This, however, is not the rule as to third persons. In this action the State of Wisconsin is the third party, and the question is, when was

the State of Wisconsin affected by the treaty of 1854. The rule laid down in situations of this kind, is discussed in the case of *Jackar vs. Magee*, 9 Wall. 33. The following quotation taken from that case shows that so far as any of the rights of the State of Wisconsin are concerned, the date of ratification, to-wit: August 2nd, controls, as to when this treaty went into effect:

“It is undoubtedly true, as a principle of international law, that, as respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard, the exchange of ratification has a retroactive effect, confirming the treaty from its date. *Wheat. Int. Law*, by Dana, 336. But a different rule prevails where the treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified. In so far as it affects them, it is not considered as concluded until there is an exchange of ratifications, and this, we understand to have been decided by this court, in *Arredondo's case*, reported in 6, *Peters*. The reason of the rule is apparent. In this country, a treaty is something more than a contract, for the federal constitution declares it be the law of the land. If so, before it can become a law, the Senate, in whom rests the authority to ratify it, must agree to it. But the Senate are not required to adopt or reject it, as a whole, but may modify or amend it, as was done with the treaty under consideration. As the individual citizen, on whose rights of property it operates, has no means of knowing anything of it while before the Senate, it would be wrong in principle to hold him bound by it, as the law of the land, until it was ratified and proclaimed. And to construe the law, so as to make the ratification of the treaty, relate back to its signing, thereby revesting a title already vested, would be manifestly unjust, and cannot be sanctioned.”

Jacker vs. Magee, 9 Wall. 33.

It is apparent, therefore, that if this be the true rule, that practically all of the section lines were run in the present reservation prior to Aug. 2nd; five townships were surveyed and approved prior to May 12th, 1854, and three townships were actually surveyed on the ground, between May 12th, 1854, and August 2nd, 19154. The latter three were not approved until after August 2nd.

It is also conceded that all of the section lines have been run and the sections identified and surveys approved up to the present time. The status, therefore, of the sections whose lines were run prior to May 12th, 1854, is somewhat different from those which were run between May 12th, 1854, and August 2nd, 1854, and different from those whose lines were run thereafter. In the cases in which the section lines were run before May 12th, 1854, there is the additional argument that these sections had become identified prior to the treaty of 1854 and were then unquestionably the states. In the other cases the argument still remains that the entire Indian title was extinguished in 1850, and that the Government could not in any manner incumber school section 16, and that the right of the state to them, although resting in compact, was as sacred as any grant could be, and all that was needed was the identification, to complete the state's title. Identification has been had in all cases.

In order to dispose of this case it is not material whether the State of Wisconsin has asked for more relief than it is entitled to. The question is, has it asked for some relief to which it is entitled? The complaint is not open to demurrer, because the plaintiff is not entitled to all of the relief it supposes itself to be entitled to.

If upon the facts stated in the complaint the plaintiff has stated a cause of action in equity within any of the heads of equity jurisdiction, and is entitled to some relief within any of those classifications, then the complaint states a cause of action in favor of the state and the motion to dismiss should be denied.

Great stress has been laid upon the statement made in the case of Beecher vs. Weatherby to the effect that the Indians had been removed from the lands which were in controversy in that action. The entire Stockbridge Reservation comprised two townships, and a township and a half were sold. Upon the remaining one-half township the Stockbridge Indians still reside. At no time were they more than a few miles from the lands in controversy, and as a matter of fact still hunt over the township and a half sold as much as ever. This land was at their very doors and was without question used by them. If it be assumed that at the time controversy arose in the Beecher case that the Stockbridge Indians were not physically on the land, but lived three or four miles away, and if that fact is relied upon by the defendant in this action to distinguish that case from the case at bar, then it must be apparent that in the case at bar the Indians were never on the land at the time the rights of the state became settled, and in fact that is shown conclusively by the records in the Department of the Interior, which shows that they were removed to their present reservation in 1853. Contracts for their removal at a certain price per head were made. The complaint alleges that these Indians did not in fact occupy any portion of this reservation until 1853 and were not in the occupancy of it until that time. If the fact of non-occupancy is material, then it is conclusively shown that there was no occupancy in this case. In addition to the facts set out in the Beecher case it is alleged in the complaint shown by the files of the department that the President of the United States ordered the Menominee Indians to remove in accordance with their treaty of 1848. The tract of land ceded by the Menominee by the Treaty of 1848 comprised something like four million acres. They occupied but a small part near Lake Poygan, near the mouth of the Wolf River. This is the part of the reservation which they occupied and to which the two year limitation applied. They not only were ordered to remove to Minnesota, but were actually moved from the territory they were occupying temporarily upon the lands included within the present reservation. Surely it cannot be held that a new occupancy could be cre-

ated after 1850, which would in any manner defeat the right of the state to its school sections granted by the enabling act.

The complaint alleges that none of Sections 16 of the present reservation have ever been occupied by the Indians and are not now occupied. The Indians did not occupy any part of Towns 28-29-30, Ranges 13 and 14, until after the treaty of 1854. What they did occupy was a part of the lands included within Ranges 15, 16, 17, 18, 19, of Towns 28, 29 and 30, and that occupancy did not begin until their removal to this land in 1853.

We respectfully ask that the motion to dismiss be denied.

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Special Counsel.

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Supreme Court, U. S.

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JAMES O. WALKER

CLERK

Original No. **7**

In the Supreme Court of the United States

October Term, 1913

THE STATE OF WISCONSIN

vs.

FRANKLIN E. LANE, SECRETARY OF THE
INTERIOR

In Equity

BRIEF AND ANSWER TO PETITION OF WISCONSIN, UNDER AN
ORDER OF THE COURT, FOR THE RECOVERY OF

WILLIAM L. STONE

Attorney for Plaintiff

JOHN F. KENNEDY, JR. & ASSOCIATES

Attorneys for Defendant

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In Supreme Court of the United States

October Term, 1913.

THE STATE OF WISCONSIN,

vs.

FRANKLIN K. LANE,

Secretary of the Interior.

Original No. 10

In Equity.

BRIEF FOR COMPLAINANT, IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE ORIGINAL BILL OF COMPLAINT.

The bill of complaint herein was filed to determine, and quiet, the title of the State of Wisconsin and of its grantees to Sections 16 within the boundaries of the Menominee Reservation in Shawano County, Wisconsin; to remove the cloud on the title caused by the adverse claims and acts of the defendant, acting for the United States, and the bill sets out the facts showing the threats of the defendant and of the Menominee Indians under his direction, to do irreparable damage and to commit waste by removing the timber therefrom; and alleges the inadequacy of other relief and prays also for an injunction against the threatened damage.

Historical Statement.

A brief review of the facts as alleged in the bill in chronological order will, we believe, be helpful to the Court in disposing of the issues raised by the defendant's motion to dismiss the original bill of complaint.

The land in controversy is probably within the general description of the Menominee lands as described in the Treaties with the Menominee Indians of 1825 and 1831.

However, their actual homes were far south and east, along

the shores of Green Bay, Fox River and Lake Winnebago, and also southeasterly of the Fox River—in fact, their claims extended as far south as Milwaukee, covering a very large part of what is now the State of Wisconsin.

By the Treaty of 1831, third subdivision, the Menominees gave up all claim to the lands southeasterly of Winnebago Lake, Fox River and Green Bay.

It was further provided by the fourth subdivision that certain specified lands, then occupied by the Menominees, should be set apart and designated **for their future homes**, upon which their improvements as an agricultural people were to be made. This land is described in the Treaty and lies between the lower Fox, Lake Winnebago, the upper Fox, and extends a ways up the Wolf River, but does not include any part of the present reservation.

These lands were thenceforth to constitute their reservation except as the treaty in its sixth paragraph provided that the remainder of the unceded lands adjoining their farming country should remain to them “for a hunting ground, until the President of the United States shall declare it expedient to extinguish their title,” and in which case they then promised to surrender them immediately.

By the Treaty with the Menominees of September 3, 1836, the Menominees ceded to the United States certain lands, including the lands between the Fox River, lower Wolf, Lake Winnebago and upper Fox, and which cession also included the eastern part of what is now called the Menominee Reservation.

Thereafter the Indians remained northerly of the upper Fox and westerly of the lower Wolf, and in and about Lakes Poygan and Winneconne (Pow-aw-hay-kon-nay).

By Act of Congress of August 6th, 1846, 9 Statutes at Large, 56, the people of the territory of Wisconsin were authorized to organize a state and by that act there was submitted to the convention which should assemble for the purpose of forming a constitution for the State of Wisconsin for

acceptance or rejection certain propositions. The first of which was:

“1. That Section numbered 16 in every Township of the public lands in said State, and where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, **shall be granted to said State for the uses of schools.**”

These provisions were promised on condition that the convention should provide by a clause in the state constitution or by an ordinance irrevocable without the consent of the United States, that the State would never interfere with the primary disposal of the soil within it, etc., and the act provided that if the propositions were accepted by the convention and ratified by an article in the constitution that **they should be obligatory on the United States.**

The convention accepted the propositions and ratified them by an article in the constitution, and performed all the provisions required by the act of admission.

It was therefore an unalterable condition of the admission, obligatory on the United States, that Section 16 in every Township of the public lands in the State which had not been sold or otherwise disposed of, should be granted to the State for the uses of its schools.

At that time more than two-thirds of the State of Wisconsin—and in fact all of the unsettled part—was claimed by different bands of Indians, but manifestly all these lands were intended to be covered by the provision giving sections 16 to the State for school purposes.

Wisconsin was admitted into the Union, May 29th, 1848.

The constitution of Wisconsin was adopted February 1st, 1848, and the provisions thereof, in compliance with the provisions of the enabling act, will be found in Section 2 of Article II thereof.

It will be noticed that at this time the Menominee Indians' home was around Lake Winneconne (Wah-na-kun-nah), which was in the treaty of 1836 called “their own country,”

though quite likely some few of them were at different points along the Fox River and Green Bay, as the treaty of 1836 was made at Cedar Point on the lower Fox River.

By the enabling act of 1846 and by the acceptance of the State of Wisconsin in its constitution of the propositions contained in the enabling act, it was understood that the State acquired Sections 16 in all these lands in Wisconsin both southeasterly and northwesterly of the Fox River.

In recognition of the understanding the Government proceeded to provide for the removal ^{al} of the Indians and entered into the treaty with the Menominees of October 18th, 1848, ratified January 23d, 1849.

By this treaty the Menominees ceded, sold and relinquished for a valuable consideration all their lands in Wisconsin. See Article 2 of said treaty.

Other lands were given them farther west as well as \$350,000.00 in money. Provision only being made by Article 8 that the Indians might be permitted to remain on the ceded lands for two years from the date of the treaty "and until notified by the President."

This was clearly a release by the Indians of any claim or right to all these lands and thereupon the state's title to the sixteenth section in all of said lands became absolutely certain at the end of the two year period.

The fact that the Indians had ceded all their lands in Wisconsin was well understood and recognized by the Indians as will appear from a brief reference to their petition, Ex. "A" to the original bill, page 37.

It further appears from said petition **that they had then been notified that the United States** would expect them to remove to the new home set apart for them by the 18th of October, 1850, in accordance with the provisions of the treaty.

It is therefore apparent that the Indians' right to remain on the land had been terminated by the President in accordance with a provision of the treaty and as provided therein.

In accordance with their petition, President Fillmore, under date of September 5th, 1850 (original bill, page 41), extended to them permission "to remain temporarily" until the first day of June, 1851, **"provided they do not interfere with any surveys which may be ordered, and they must not understand this as granting any indulgence beyond that time."** This time was subsequently extended by the President to June 1st, 1852. See Ex. "I" to original bill, and again to October 1st, 1852; see Ex. "J" to original bill.

The fact that the Indians' rights had been sold and released and that the lands ~~had~~ become public lands, and that the title to the sections 16 had vested in the State, was understood by all the parties, is shown by the further fact that surveys thereof were then being made and by the facts that the State's right was recognized and that its consent, to the temporary occupancy under the President's order, was deemed necessary, and was given, though somewhat belated, on February 1st, 1853.

This consent, however, related only to the Indians' **remaining temporarily under the President's order**; that is, for the purpose of giving them a brief additional time to remove from the State.

The public surveys were made by the United States in 1851 and 1852 (original bill of complaint, page 26). The section lines were run in September, 1853, and June and July, 1854 (bill of complaint, page 27).

Thus these lands became and were public lands, duly surveyed, the sections 16 identified, and the right of the State thereto recognized before the treaty of 1854, which is the treaty next to be considered, and which established and fixed the limits of the present Menominee reservation.

The treaty of 1854 was not ratified, nor proclaimed nor effective until August 2d, 1854. Under that treaty the Menominees re-ceded to the Government the western land given them by the treaty of 1848, and the United States agreed to give to the Indians for a home, "to be held as Indian lands are held,"

the tract upon the Wolf River in Wisconsin commencing at the southeast corner of Township 28, North, of Range 16 East, of the 4th Principal Meridian, running West 24 miles; thence North 18 miles; thence East 24 miles; thence South 18 miles to the place of beginning, the same being townships 28, 29 and 30 of Ranges 13, 14, 15 and 16, **"according to the public survey."** Bill of complaint, pages 24-25.

The treaty itself thus demonstrated that these lands were then public lands, **had been previously surveyed by the United States**, and the sections already identified, so that the 16th sections had theretofore passed absolutely to the State of Wisconsin. In fact, the eastern part of the present reservation had been absolutely ceded by the Indians by the treaty of 1836.

The state of Wisconsin always understood that it owned absolutely, and always claimed the sections 16; and the state patented and conveyed a great many of said sections to persons who purchased in good faith and who paid value therefor. Original bill, page 27. It will be noted that the lands in the present reservation were partly ceded by the Indians under the treaty of September 3, 1836, and the balance by treaty of October 8th, 1848, ratified January 23rd, 1849.

After January 23rd, 1849, the Indians had no title in the land at all; "they were not then held as other Indian lands are held." As a matter of fact, the Indians then had only a license to remain temporarily for two years, pending their making arrangements for removal to their own lands in Minnesota, and within said two years they were notified by the President to remove within said time; and thereafter by the President's executive order, subsequently assented to by the State, they were given several short extensions, **which, however, terminated finally in October, 1852.**

That thereupon, i. e., in October, 1852, all their rights of every kind absolutely ceased; and thereafter the State had the absolute title.

The sections 16 having vested absolutely in the state prior

to the treaty of 1854, ratified August 2d, 1854, and the land having been theretofore surveyed as public land, the state's title to the sections 16 is perfect.

The treaty of 1854 with the Menominees, therefore, could not make a reservation out of the sections 16 belonging to the State, although its outer boundaries might embrace them.

They still belong to the State, absolutely.

In this case it may be well to notice that the Indians at the time of the treaty of 1848 did not live on these lands nor occupy them, and they were not part of the lands set apart for their homes under the treaty of 1831. Bill of complaint, subdivision 26, page 28.

In fact, the Indians did not remove from the homes which they occupied at the time of the treaties of 1831 and 1848 until about 1853. Original bill, page 29.

Many of the sections 16 owned by the State were sold, and the grantees have for many years paid taxes thereon and the same have been assessed for taxation purposes. Original bill, page 30.

By a subsequent treaty a portion of these lands were ceded to the Stockbridge and Munsee tribes and under act of Congress of February 6th, 1871, a portion of the Stockbridge and Munsee townships were directed to be sold. A conflict arose as to the title of a portion thereof and as to the ownership of the logs cut therefrom, which resulted in the matter being brought before this court on appeal, the decision whereof is reported under the title of *Beecher vs. Wetherby*, 95 U. S. 517. The plaintiff claimed under patents from the United States issued on the sale under the act of 1871. The defendant asserted title under patents of the State of Wisconsin issued in 1870 and the title under the state patent was upheld.

The decision of this court in that case that Congress intended to vest in the State the fee to the sections 16 in every township has since 1877 been accepted as a rule of property with relation to all the sixteenth sections in the Menominee reservation.

The decision of this court that the fee vested in the State has been relied upon ever since by those purchasing said sections from the State and from the grantees of the State, and a great deal of property has been acquired by different individuals in reliance upon said decision.

This rule has been accepted, ratified and confirmed by many decisions of the different governmental departments. Original bill, page 32. Ex. "F" and accompanying opinion, pages 44 to 51. Ex. "C," pages 41-42. Original bill, pages 32-33-34.

The lands embraced in the claim of the state and its grantees is completely covered with valuable timber, increasing in value each year, and there is no necessity to cut it. Original bill, page 30. The Menominee tribe, under the direction of the Department have established a large saw-mill at Neopit within the reservation and are cutting and sawing large amounts of timber, and are selling the lumber manufactured therefrom; the tribe has hundreds of millions of feet of their own, and the Indians are now claiming, under the advice and with the consent of the present Secretary of the Interior, the right to cut the timber on the sections 16 belonging to the complainant and its grantees and have entered upon some of said tracts and have actually cut some and threaten to cut all the timber thereon. Such cutting being without any intention of improving said lands, and none of the Indians ever having lived thereon. Such cutting would leave the lands of little or no value. Original bill, pages 30-31.

The land in dispute consists of about 6,400 acres of the value of over \$100,000.00. Original bill, page 34.

The bill alleges that the acts and claims of the Indians and of the Secretary of the Interior in their behalf, and their denial of complainant's title and ownership and of that of its grantees, tend to cast a cloud upon the complainant's title and upon that of its grantees; to decrease the value of the lands; to prevent the use and occupancy and sale thereof, and will greatly damage the state and its grantees, and that the com-

plainant and its grantees can have no adequate relief except in this court. Original bill, page 35, subdivisions 38 to 41. Original bill, page 31.

ARGUMENT.

We take it that on motions to dismiss, the same, if not greater liberality will be extended in favor of the bill, than in case of demurrers under the former practice.

The motion to dismiss attempts to state four heads or reasons for dismissal.

We submit that none of defendant's propositions are tenable and that the motion to dismiss the bill should be denied.

I.

Jurisdiction.

This is a suit in equity commenced in this court, as a court of original jurisdiction, by the State of Wisconsin, against Franklin K. Lane, Secretary of the Interior, to determine the right of the complainant to what are commonly known as School Lands in an Indian Reservation or cession and where an Indian Tribe claims some right or interest in the said lands or in the disposition thereof by the United States, and further, to enjoin the Secretary of the Interior, the officers, servants and employees of the Department of which he is the official head and the Menominee Tribe of Indians from interfering with said lands and from committing waste thereon and especially from entering upon said land and cutting timber therefrom.

The lands which are claimed by the State of Wisconsin and its grantees, and involved in this suit, are sections 16, in Townships 28, 29 and 30, of Ranges 13, 14, 15 and 16, according to the public survey, except only those Sections 16 in Township 28, Ranges 13 and 14 East.

The pertinent constitutional provisions are found in Section 2, Article 3, as follows:

"The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state or the citizens thereof and foreign states, citizens or subjects."

"In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

This court held, after an exhaustive discussion of the meaning of the above constitutional provisions, that an action in equity between a state and the Secretary of the Interior, involving school lands in an Indian Reservation, was a controversy to which the United States might be regarded as a party, whether plaintiff or defendant, thus bringing the case within the general jurisdiction of the Federal Courts. The court discussed at length the question as to whether it had original jurisdiction thereof under the second paragraph above quoted, and decided that, although the United States was not named as a defendant, the legal title to the lands in question was in the United States; that the officers named as defendants had no interest in them and that the United States was therefore the real party to be affected by the judgment.

That the United States has no substantial interest in the lands and that it holds the legal title only in trust for the Indians, is suggested and the court grants that if the case stood alone upon a construction of the treaty between the Indians and United States there might be some force to this objection, but calls attention to the fact that the government has as-

sumed a personal responsibility when it passed on March 2, 1901, the following act:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that in any suit heretofore or hereafter instituted in the Supreme Court of the United States to determine the right of a state to what are commonly known as school lands within any Indian Reservation or any Indian cession where an Indian tribe claims any right to or interest in the lands in controversy, or in the disposition thereof by the United States, the right of such state may be fully tested and determined without making the Indian tribe, or any portion thereof, a party of the suit, if the Secretary of the Interior is made a party thereto; and the duty of representing and defending the right or interest of the Indian tribe, or any portion thereof, in the matter, shall devolve upon the Attorney General upon the request of such Secretary." 31 Stat. at L. 950, Chap. 808.

As to the bearing of this act upon the question, the court said:

"It has by this legislation in effect declared that the Indians, although the real parties in interest, need not be made parties to the suit; that the United States will, for the purpose of the litigation, stand as the real party in interest, and, so far as it could within constitutional limits, has expressed the consent of the government to maintenance of this suit in this By the act, it, in effect, declares that it waives all objections on the ground that it is a mere trustee; that it assumes the full responsibilities of ownership, and that it will, whatever may be the outcome of any litigation, stand responsible to the Indians for the value of the lands in controversy. Can the court say that the United States may not assume such responsibility; may not waive all objections on account of the mere matter of trusteeship, and stand in court as the responsible owner, against whom all litigation may be directed? If it stands as such owner, then within the proposition heretofore referred to a suit which is against its agents, not affecting them individually, but affecting only its title to the real estate,

is in substance and effect a suit against the United States. The controversy is made by the act of 1901 one to which the United States is a party in interest, to be directly affected by the result, and therefore the case is within the 1st paragraph, as one to which the judicial power of the United States extends."

"We are of opinion, therefore, that this court has jurisdiction of the controversy and is called upon to determine the case upon its merits."

Minnesota vs. Hitchcock, 185 U. S. 373, 46 L. E. D. 954.

This action is one in which Franklin K. Lane, Secretary of the Interior, is defendant. It is instituted to determine the right of a state to what are commonly known as school lands with an Indian Reservation or Indian cession where an Indian tribe claims a right to such lands or an interest therein.

The United States while not named as a party, and while having no substantial interest in the land in controversy, has by the act of 1901 undertaken the responsibility of defending it.

So far as the jurisdictional question is concerned, it seems to fall squarely within the rule laid down in the Minnesota case.

The commencement of this suit by the state of Wisconsin through its Attorney General, is duly authorized by Chapter 95 of the laws of 1903 of said State of Wisconsin, which is as follows:

The people of the State of Wisconsin represented in Senate and Assembly do enact as follows:

Rights of State to Be Determined. Section 1. The Attorney General of Wisconsin is hereby authorized to institute suit in the Supreme Court of the United States, under the provisions of an act of Congress passed March 2d, 1901, to determine the rights of this State to what are commonly known as school lands, within any reservation or Indian concession within this State, where any Indian tribe claims any right to or interest in said lands, or in the disposition thereof by the United States, and particularly to determine the title to the lands

embraced within Section 16 in the several townships constituting the present Bad River or La Pointe and the Flambeau Indian Reservations within this State.

Section 2. This act shall take effect and be in force from and after its passage and publication.

Approved April 20, 1903.

II.

The complainant asks to have its title to these lands determined and quieted; and to be protected against the threatened acts of the defendant and the Menominee tribe, which acts will, if carried out, create irremediable injury.

It is the settlement of this question of the conflicting claims as to title, right of possession and ownership, that constitute the main questions at issue in this suit.

These questions we propose to discuss briefly and under two heads:

A.

The complainant claims, by virtue of the act of Congress providing for the organization of the State of Wisconsin, and the propositions in said act contained, and the acceptance thereof in the constitution of the State when adopted, that the State of Wisconsin became the absolute owner in fee of the sections 16 in the Menominee reservation.

The facts in this case are dissimilar to those in any case previously before this court. We say this advisedly because though the case of *Beecher vs. Wetherby*, 95 U. S. 517, arose over controversies relating to lands in a part of the same reservation, we submit that material and controlling facts were not before the court in that case.

Whatever the claims of the Menominee Indians may originally have been, and whatever recognition thereof may have been made by the government in the early treaties, it is now shown by the allegations of the bill:

First: That the Eastern part of the present reservation of

the Menominees was ceded to the United States by the Indians under the treaty of September 3d, 1836. That such land thereby became public lands; the school sections therein passed directly to the State at the time of its admission, and were identified by public survey long before the treaty of 1854.

Second: That whatever title the Menominee Indians had to the balance of the lands, was sold, ceded and conveyed to the United States by them for a valuable consideration by the treaty of 1848, ratified January 23d, 1849.

That after the making of this treaty the Indians had only a bare license at most, to remain temporarily for two years from the date of the treaty and until the President should notify them that the same were wanted. That within the two years, the President did so notify them and require them to remove by October 18th, 1850. That therefore, under the language of the treaty, every vestige of right on their part terminated October 18th, 1850.

The land then became public land, was surveyed in 1852 and the sections 16 therein passed absolutely to the State of Wisconsin.

The fact of the President requiring them to remove as specified in the treaty—thus terminating their temporary right of occupancy—was not before this court in *Beecher vs. Wetherby*, and has been overlooked by the departments in their rulings, both before and since that time, though the record evidence thereof is in existence and thus now establishes the total termination of the Indians' rights of every kind in the manner prescribed in the treaty.

It is true that the President subsequently—but without any authority under the treaty—gave the Indians brief additional periods, finally terminating October 1, 1852.

The Federal Government, however, understood that these extensions could not affect the vested rights of the State and the State's consent to such temporary provision was sought and obtained—though such consent was only to the Indians'

temporarily remaining as ordered and directed by the President.

The last vestige of right or authority on the part of the Indians to remain under any license whatever terminated finally, as we have said, on October 1st, 1852. The lands were then surveyed, were public lands, and the sections 16 therein passed to the State. The survey of these lands as public lands, and the consequent identification of these sections 16 at a time prior to the attempt to establish the present reservation are material facts and distinguish this case from the other cases which have been before this court.

We claim that on these facts the title of the State of Wisconsin, at least after October 1st, 1852, was the full and absolute title to all of these sections 16 and that the State then had and ever since has had the fee to said lands and the right of possession thereof.

If the acts and construction of the parties be of any weight, then the court must consider that the treaty of 1848, following immediately upon the admission of the state, evinces the purpose of the United States to make of these lands public lands and to give the state the immediate benefit of the provision made for the support and maintenance of its schools.

Again, the securing of the State's consent to the temporary remaining of the Indians shows the recognition by the United States of the fact that all the Indians' rights in these lands and all the United States' claim to the sections 16 therein had ceased because of the provision of the acts of Congress and of the treaty of 1848 and because of the President's notice to the Indians under that treaty that they must remove by October 18th, 1850.

Again, all rights of every kind, even under the temporary license of the President, expired in October, 1852.

Thereafter the presence of the Indians was without any rights whatever. The lands were public lands. They were surveyed. And the State became the absolute owner of the sections 16 therein. We call the court's attention to these

facts particularly for they distinguished the present case from the record before the court in *Beecher vs. Wetherby*.

In *Beecher vs. Wetherby* this court squarely held with reference to this reservation "that Congress intended to vest in the State the fees to section 16 in every township," and the court further said that such right of the State was subject to the occupancy of the Indians.

The court evidently assuming that the two years of temporary right to remain given the Indians by the treaty of 1848 "and until the President shall notify them that the same are wanted," had continued under the quoted provision until the making of the later treaty of 1854.

It now appears, however, that the President had, under the provision of 1848, notified the Indians to remove by October 18th, 1850, and that therefore their rights of occupancy had ceased in accordance with the terms of the treaty, and even if their occupancy after that could be upheld under the President's subsequent orders, **that all such rights ceased on October 1st, 1852.**

This is particularly important because it shows the total extinguishment of the Indians' rights, even of temporarily remaining on the land, long before the treaty of 1854.

And this, in connection with the fact that the lands then became public lands and were surveyed and the sections 16 identified before the treaty, establishes the State's title absolutely and free from any rights of occupancy on the Indians' part at the time of the treaty of 1854.

These material and distinguishing facts were not presented to this court by the record in *Beecher vs. Wetherby*, 95 U. S. 517. However, the judgment of this court in that case having upheld the title under the state patent, it would have made no difference in the final judgment therein.

We ask the court, on the facts alleged to hold that the allegations of the bill show absolute ownership in fee simple of these sections 16 in this suit, free from any rights of occupancy whatever in the Indians.

In other words, we believe that in the case of this particular reservation—different from practically all the other cases—the facts show that the sections 16 became and were the absolute property of the State before the present reservation was formed.

The creation of the present reservation by the treaty of 1854, while it was effectual to establish a reservation out of that part of the public domain then belonging to the United States, could not affect, nor include the school sections 16 which had then already passed absolutely to the State.

Putting it perhaps more concisely, while the outer limits might circumscribe the sixteenth sections, the title to the school sections could not be affected, and still remains to the State of Wisconsin.

B.

Even if it should appear on the trial of the facts or otherwise that the Indians' occupancy had continued until the time of the treaty of 1854, and that the title to the 16th sections which passed to the state was subject to some rights of occupancy on the part of the Indians, the State and its grantees would nevertheless be the legal owners of the title and the remaindermen, after the Indians' occupancy is terminated, and as such ~~legal~~ ^{then} owners and remaindermen would be entitled to main ^{tain} this bill for the purpose of having such title adjudged, and for the purpose of preventing the impairment of property by the threatened acts of waste on the part of the occupants.

This right and title of the State of Wisconsin in and to the 16th sections of this particular reservation were determined and established by this court in *Beecher vs. Wetherby*.

That decision settled the law on that proposition for this reservation for all time.

This court there held "That Congress intended to vest in the State the fee to section 16 in every township."

On this point the court further said, "The greater part of

the State was, at the date of the compact, occupied by different tribes, and the granting of sections in other portions would have been comparatively of little value. Congress undoubtedly expected that at no distant day the State would be settled by white people and semi-barbarous condition of the Indian tribes would give place to the higher civilization of our race."

This court particularly called attention to the fact that surveys of the land had been made and on that point said: "In this case the township embracing the land in question was surveyed in October, 1852, and was subdivided into sections in May and June, 1854. With this identification of the sections the title of the State, upon the authority cited, became complete, unless there had been a sale or other disposition of the property by the United States previous to the compact with the State. No subsequent sale or other disposition, as already stated, could defeat the appropriation."

It is true that in that case it was not shown to the court that the President had notified the Indians to remove in accordance with the treaty of 1848, and that the time limited for them to remove by the treaty and by such notice, and even by the subsequent temporary extensions, had all expired long before the treaty of 1854.

It is evident that this court, in *Beecher vs. Wetherby*, assumed that the President had never given such notice of removal and that consequently the right of occupancy under the treaty continued until the new treaty of 1854; and it was with that view of the facts in mind that this court said, in its opinion: "But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee and could not disturb the occupancy of the Indians." Again, "The right of the United States to dispose of the fee of lands occupied by them (the Indians) has always been recognized by this court from the foundation of the government;" and again, quoting from *Johnson vs. McIntosh*, 8 Wheaton, 543: "The possession,

when abandoned by the Indians, attaches itself to the fee without further grant." The court also laid down with reference to these particular sections 16 the propositions that whether the enabling act and the act of admission created a grant in praesenti or in future, that "in either case the lands which might be embraced within those sections were appropriated to the State," and again, that "They could not be diverted from their appropriation to the state."

This court also, following the decision in *Cooper vs. Roberts*, 18 Howard 173, laid particular stress upon the fact of a survey having been made, and said: "But when the political authorities have performed this duty (surveyed out the land), the compact has an object upon which it can attach, and if there is no legal impediment, the title of the State becomes a legal title. The *jus ad rem* by the performance of that executive act becomes a *jus in re*, judicial in its nature and under the cognizance and protection of the judicial authorities as well as the others."

The decision of this court that the State of Wisconsin had acquired the absolute fee to the sixteenth sections in the Menominee Reservation became and has ever since been a rule of property for all concerned therein.

The state has patented lands in said sections, for value, to its citizens, relying upon that decision.

The grantees of the state in turn have sold for large considerations, different parts of these lands, so patented to them. In fact, it may be said to have been well understood, not only by the state and its grantees, and their grantees, but by the Indians and the government departments as well, that the decision in *Beecher vs. Wetherby* had established for all time the state's right to these sections sixteen.

The departments of the government in their rulings, and their legal advisers in their opinions, recognized the state's right in and to these sections under that decision.

Reference is made in the bill to these facts and certain

opinions of the department referred to, and some of them attached as exhibits to the bill

See Exhibit F, original bill, page 44; and
Opinion of Asst. Atty. Gen. Shields, page 45, etc.

In fact, the government paid on different occasions large damages for trespasses committed by the Indians upon these lands.

Original bill, page 34.

The decision of this court in *Beecher vs. Wetherby*, recognizing **rule of property** with relation to this Reservation for almost forty years.

Lands have been sold and bought in reliance upon it, and to change that rule now would cause hundreds of thousands of dollars of loss to parties who have acted upon the faith of that decision.

If it be held in this case that the state's right and title to school sections is subject to any right of occupancy on the part of the Indians, even then this bill is properly brought, and the complainant is entitled to a judgment or decree determining its title and enjoining the defendant from committing waste thereon.

This court in the case of *United States vs. Cook*, 86 U. S. 591, established the rule that the mere right of occupancy in the Indians did not and could not give them any right to cut down and destroy the timber as against their remainderman.

In our case it is alleged in the bill that the Indians are cutting and threatening to cut this timber solely for sale, that is, for commercial purposes. That none of them live on the land, that there is no idea of improving it, and that the cutting which they are doing and threatening to continue is for the purpose solely of selling the timber and the lumber manufactured from it to others for money. It will be manifest that in this case the cutting and selling of the lumber for money is the sole and paramount object of the Indians, and that it has no connection, incidental or otherwise, with any improvement of the land.

This court in the Cook case said, what is peculiarly applicable to this case, viz: "In this case it is not pretended that the timber from which the saw logs were made was cut for the purpose of improving the land; it was not taken from any portion of the land which was occupied, or so far as appears intended to be occupied for any purpose inconsistent with the continued presence of the timber. It was cut for sale and nothing else."

And they decided that the timber so cut became the property absolutely of the remainderman, in that case the United States.

So, here, we claim that any timber so cut, would be the absolute property of the remaindermen, or, in other words, the absolute property of the State of Wisconsin, or its grantees.

This court further said in the Cook case: "These are familiar principles in this country, and well settled, as applicable to tenants, for life and remaindermen."

And again: "**The Indians having only a right of occupancy in the lands, the presumption is against their authority to cut and sell the timber.**"

The court also say, that cutting, for commercial purposes or for any purpose other than the improvement of the land, would be waste and unauthorized. The decision in the Cook case applies with particular force to the facts here, as shown by the allegations of the bill.

The cutting here is solely for commercial purposes; it is only being done for the purpose of getting money by the sale of the manufactured product. There is no intention of using the land for homes. None of the Indians have ever lived upon it.

More than that, it is done under a claim by the defendants—of recent origin—that the Indians absolutely own the land, and have the right to cut and sell all the timber for any purposes whatsoever.

This new idea of the department that the decision in *Beecher vs. Wetherby* is not the law, is founded upon what we consider a misconception of certain more recent decisions of this court.

One of these cases is, *Minnesota v. Hitchcock*, 185 U. S. 373. That case arose under a different congressional act, purporting to give the state of Minnesota sections 16 and 36 in each township.

This case is readily distinguishable from the case at bar, as it is also easily distinguishable from the case of *Beecher vs. Wetherby*.

In fact, this court, in its decision in the *Minnesota* case, page 397, carefully noted the main distinguishing features.

That is, in *Beecher vs. Wetherby*, and in the case at bar, the cession from the Indians is not subject to any trust whatever, while in the *Minnesota* case there was such a trust imposed.

Again, in the case of the *Menominee Indians*, when they ceded their lands in 1848 to the United States, they received a cash and real estate consideration from the government for their lands, which was not so in the *Minnesota* case.

So, too, in the case of the *Menominee Reservation* in Wisconsin, the Indians by the Treaty of 1848, had given up all rights of every kind, including their right of occupancy. Even the provision for their remaining two years on a part of the lands ceded, had been ended by notice from the President in accordance with the treaty, and they were, at the time of the Treaty of 1854, mere trespassers on the land, and at that time they were not located upon any of the lands later covered by the Reservation as fixed by the Treaty of 1854.

Again, all these lands within the present Reservation, had prior to the Treaty of 1854, been surveyed, and the sections 16 identified, and this at a time when they were entirely unoccupied, and when the Indians had no right therein and were not occupying the same.

This is all different from the Minnesota case, where this court particularly called attention to the fact that the arrangements between the government and the Indians there were made "before any survey of the lands, before the state right had attached to any particular sections."

That is, in the Minnesota case, the situation was such that the state rights existed in compact only, and particular sections belonging to the state had not been identified, or as this court said in *Cooper vs. Roberts*, 18 How. 173: "We agree that until the survey of the township and the designation of the specific sections, the right of the State rests in compact." This was the situation in the Minnesota case.

The situation in the case at bar, and in *Beecher vs. Wetherby*, comes within the further statement of this court, in *Cooper vs. Roberts*, when they said: "But when the political authorities have performed this duty (made the survey), the compact has an object upon which it can attach."

In fact, the controlling points in the Minnesota case were, that the cession by the Indians was subject to a trust which the government was bound to carry out, was made at a time when the Indians were actually occupying all the lands "as other Indian lands are held," and while the state's right had not been established by the identification of sections 16 and 36 by a survey.

This court, in the Minnesota case, did not overrule *Beecher vs. Wetherby*, and in fact cites that case with approval, and shows the distinguishing facts between the two cases.

This court in the Minnesota case, page 41, further said: "It is also true that much of the legislation in respect to Indians and many of the treaties with them have contemplated simply a cession of their lands, and their removal to tracts further west. In such cases, where there has been simply a cession by an Indian tribe of its Reservation, and the removal to some new territory, it is not strange that the school grants have been generally held operative in the ceded reservations."

United States vs. Thomas, 151 U. S. 577, is a case arising

in the Chippewa Indian Reservation in Wisconsin, and the question was whether the sections 16 therein were within the limits of the reservation within the meaning of the criminal laws. This court held that they were, and discussed somewhat the nature of the state's interest in such sections in the Chippewa Reservation.

The facts in that case, however, are easily distinguishable from the case at bar, and from the case of *Beecher vs. Wetherby*.

At the date of the treaty before the court in that case no survey of the lands in that portion of the state had been made. Even the township lines were not run until 1855, after the treaty creating the reservation became operative. So that, within the rule of this court in *Cooper vs. Roberts*, the Michigan case, the state's rights had not vested absolutely, but rested in compact at the time the reservation was established.

In that case, differing from ours, it appeared that the prior cession by the Chippewas under the treaty dated October 4, 1842, reserved to the Indians the usual privileges of occupancy until required to remove by the President of the United States, and that the President had not, in that case, ordered such removal.

In our case, it now appears that the President had terminated the temporary right of the Menominee Indians.

Again, in the Chippewa case, the Indians were still occupying the ceded lands.

In our case, not only had their rights of occupancy ceased, but they were not occupying the land which constitutes the present reservation. As a matter of fact, part of the present Menominee reservation had been transferred to the government as early as the treaty of 1836, and the remaining part, which was ceded by the treaty of 1848, and under which by the giving of the notice by the President, all rights of the Indians had been foreclosed, was not in the occupancy of the Indians at all at the time it was surveyed, and the state's right there-to had become fixed.

Particular stress was laid by this court in the Thomas case, upon the fact that the President never required the Chippewa Indians to surrender their occupancy under the provisions of their treaty, as showing that their right continued.

In our case, it is settled that the President did give the notice under the strict provisions of the terms of the Menominee Treaty of 1848, and that all the Indians' rights of every kind, including occupancy, legally terminated, and the lands were surveyed and identified and the rights of the State vested prior to the Treaty of 1854.

The court, in the Thomas case, further said, that independently of any question of title, the land within the outer limits of the reservation, would be considered within the reservation within the meaning of the criminal laws; and that was really the only question involved in the case.

Wisconsin vs. Hitchcock, 201 U. S. 202, was a suit brought with reference to Chippewa Reservation lands in Wisconsin, and the decision follows largely the Thomas case.

It will be noted that all the facts which distinguish the Thomas case from the case of Beecher vs. Wetherby, and from the present case, also distinguish Wisconsin vs. Hitchcock from Beecher vs. Wetherby, and from the case at bar.

In other words, at the time the Chippewa Treaty of September 30, 1854, was made, the State's rights rested in compact. That is, the lands had never been surveyed, nor the sections 16 identified.

Again, the occupancy of the Chippewa Indians of the lands ceded by them under the earlier treaty proclaimed March 23, 1843, had not been terminated by notice from the President of the United States. A great deal of stress is laid upon this by Mr. Justice Harlan in his opinion, particularly on pages 203 and 213.

On this point the court said, page 213:- "The Indians have never been removed from the lands thus ceded, and no executive order has ever been made for their removal."

On the question of survey, this court said, page 213: "When the townships composing these reservations were surveyed, the 16th section was already disposed of in the sense of the enabling act of 1846. It had been included within the limits of the reservation."

In our case the court will see that the lands were surveyed, the sections identified and the title vested in the State, long before the Menominee Treaty of 1854, creating the present reservation. It is also true that at the time they were surveyed, and prior to the Treaty of 1854, the Menominee Indians had absolutely ceded and given up all claim to the lands, and the President had ordered the termination of their temporary occupancy under the provisions of the treaty, and the time for their removing had expired, so that the State's rights were fully vested and complete.

It is further apparent in our case, that the State's right had completely vested, and that that was well understood, from the fact that the State's consent to their temporary occupancy was obtained.

The State's consent to temporary occupancy cannot be tortured into consent to a total deprivation of its rights by a permanent reservation.

The State's consent was only to the temporary remaining of the Indians under the President's order.

The State's consent referred to the brief temporary remaining of the Indians until they could be removed to Minnesota, as provided by the treaty of 1848.

The State's consent refers only to the President's order.

The fact that the State's consent was deemed necessary, shows the recognition at that time, by all parties, of the fact that the State's title had then absolutely vested in these lands.

The State's consent for the Indians to remain temporarily under the President's order, was not even to remain on the same lands afterwards covered by the reservation as established by the treaty of 1854.

As a matter of fact, part of the present reservation was ceded by the Indians absolutely by the Treaty of 1836, and was all surveyed prior to the Treaty of 1854, and all the sections 16 had absolutely passed to the State prior to that Treaty.

On the question of ownership, we submit that the State, before the Treaty of 1854, had become the absolute owner in fee of the sections 16 in the present reservation. That said sections were all surveyed and identified, and that the lands covered by the same were not subject to any Indian rights whatever, and were not occupied by the Indians.

The Indians' rights had ceased by the terms of the Treaty of 1848, and the giving of notice by the President thereunder; it cannot be claimed fairly that the State's consent to the President's allowing the Indians to remain temporarily for a little longer period, until they could be removed to Minnesota, was in any way a consent to anything more than it purported to be, that is, a mere temporary right.

That even these temporary permits of the President expired prior to the Treaty of 1854.

That so far as the Treaty of 1854 fixes the limits of the reservation, it could only deal with lands then belonging to the United States, and could not include therein, as the property of the Indians, the sections 16, which had already vested absolutely in the state of Wisconsin, and which now belonged to it and its grantees.

We further submit, that if the Indians had any right of occupancy whatever in the sections 16, it must be limited to a temporary right or license from the State which could be terminated at any time.

That the conveying of the sections 16 by the State was a determination of all rights under such license.

That in any event the Indians have no right whatever to commit waste and denude the lands of their valuable timber, and destroy their value, for commercial purposes, and that the

bill of complaint herein is proper, within the jurisdiction of the court, and the motion to dismiss the same should be denied.

III.

CESSION OF 1836.

While considerable has been said about the rights the State acquired in the 16th sections by reason of the cession by the Indians in the treaty of 1848 and the ending of the Indians' right of occupancy of all ceded lands by the President's notice, and the identification of the section by public survey, all before the treaty of 1854, it must be carried in mind that a large part of the present reservation, and perhaps the greater part, was ceded absolutely by the Indians under the treaty of 1836; then became public lands, and was public land at the time of the admission of the State of Wisconsin.

It was surveyed and the sections 16 identified in 1851-2 and 3, so that there can be no question but that the State, at the time of the treaty of 1854, creating the present reservation, was the absolute owner and in possession of the sections 16 ceded by the treaty of 1836.

The treaty of 1836 ceded to the United States a large amount of territory, described particularly in the treaty.

If we take a modern map and start at the mouth of the Wolf River (a mile above the village of Butte des Morts in Winnebago County, Wisconsin), and follow the river North to where it crosses the North line of the 500,000 tract (which line does not appear on modern maps, but must be laid out from its description in the treaty of 1831), and thence following said line go Northeasterly three miles, and thence Northerly to the upper forks of the Menominee, which are a little Northwesterly of Crystal Falls in the present state of Michigan, and then following the line to the Shos-kin-aubie River, which empties into the Great Bay De Noquet, and then follow its course to Green Bay and come back by Green Bay and the Fox River to the place of beginning, it will be found that the treaty of 1836 ceded to the United States a large part of the

present reservation and that there was no right of occupancy of any kind therein belonging to the Indians after 1836.

It is possible that it may be difficult to determine the exact line without a hearing on the facts.

Some doubt upon the subject may have been created by the erroneous maps made by David H. Burr published about 1836.

Burr's greatest errors were these: Post Lake, which is in the north central part of Langlade County and in latitude about $45^{\circ} 20'$ north, and about longitude 89° west, Burr, on his map places it in latitude $44^{\circ} 40'$, and makes the longitude a little farther east.

Again, he fails to designate Ashawano (Shawano) Lake, which is in Shawano County, Wisconsin.

The result of these errors is that when Burr attempted to outline the boundary between the Chippewas and Menominees, as fixed by the treaty of August 11th, 1827, 7 Statutes 303, and in starting from the Plover Portage, which is a few miles from the present city of Stevens Point, Portage County, Wisconsin, on the Wisconsin River, he, endeavoring to follow the provisions of that treaty and to run to a point on the Wolf River equidistant from the Ashawano and Post Lakes, on said river, made his final and gravest error and ran his line to a point half way between Post (Port) Lake—which he located far south and somewhat east of its true location—and as his map does not show Shawano Lake he seems to have taken Lake Butte des Mortes in Winnebago County, Wisconsin (the place where the treaty was made), as the other fixed point, and splitting the distance between them crossed the Wolf River perhaps 100 miles south of the true treaty point, which should have been near what is now Van Ostrand, on the Wolf River, in Langlade County, Wisconsin.

As a result of Burr's mistakes, the line on his map runs east when it should go northeasterly according to the treaty, and the total result was to show but a small part of the lands really belonging to the Menominees, and this was one of the

points later raised by the Indians after the treaty of 1848 as shown by their petition. Exhibit "A". Complaint, p. 37.

This becomes important to notice because in the cession by the Menominees under the treaty of 1836, the line, after leaving the rear line of the New York Indian tract, runs in a Northwardly course to the upper forks of the Menominee River (Northwesterly of Crystal Falls, Michigan), and as the treaty says "at a point to intersect the boundary line between the Menominee and Chippewa nation of Indians."

The boundary line between the Chippewas and Menominees, correctly laid out according to the treaty of August 11th, 1827, did go near the upper forks of the Menominee River, in that treaty called the junction of the Nee-sau-kootag or Burnt Wood River, with the Menominee.

We mention these facts to show in a brief way that the erroneous map of Burr's may have led to some confusion in this matter.

However, it is perfectly plain, considering only the true treaty lines, that all of the present Menominee reservation was within the Menominee lands and that the greater part of the reservation was ceded absolutely by the Menominees to the United States under the treaty of 1836 and the State's rights on its admission to the Union and on the public survey being made became complete, prior to the time of the treaty of 1854 creating the present reservation—though perhaps the exact portion of the reservation covered by the cession of '36 may have to be identified by proofs.

In this connection we call the court's attention to another thought, and that is, that the State became the absolute owner of the sections 16 in all the reservation prior to 1854; now, assuming that it did consent to the Indians temporarily remaining under the President's order, how can it be said on any theory that such consent or license for such purpose, can ever be construed in such a way as to take away the ownership of the State of its school sections?

How can it be said in the first place that it was a consent

to anything more than it purported to be, and that was to the Indians temporarily remaining under the President's orders? A mere license determinable at will.

On what possible theory can it be tortured into a consent that its school sections become a part of a permanent Indian reservation?

By what transmutation of title can it finally be brought about that such consent or license may confer upon the government the right to create a public park (within certain expressions in the Hitchcock case) and thus deprive the State forever of its school lands?

We submit that the situation here is indeed far different from that of all the other cases and that the decision of this court in *Beecher vs. Wetherby*, that the title had absolutely vested in the State, was well founded and should be sustained.

We submit further, that if the Indians now claim any right in the school sections that it is a claim of recent date, and that in any event the right is no broader than that covered by the license or consent of the State; and has in fact been terminated as a matter of law by the State's granting patents thereof, or if not so terminated, has been terminated in effect by the institution of this suit, or that this court shall say how the State shall terminate it.

IV.

Counsel argue with considerable earnestness, that the motion to dismiss should be granted because, "plaintiff has not set up any contract, covenant or warranty entitling it to maintain this suit as to the sections which it has heretofore disposed of," and therefore has shown no right to maintain this suit so far as the conveyed sections are concerned.

The pertinent allegations of the bill in this regard are found in paragraphs 24, 34 and 45, which are respectively as follows:

"That the State of Wisconsin sold the remaining sections 16 to innocent purchasers for value and accepted value there-

for, and it is legally and in duty bound to defend and protect these purchasers and their title to said lands and would be liable to them for damages that they might sustain by reason of any failure of title."

"And said grantees of the state have for many years paid taxes on said property, which said taxes have been received by the Counties of Wisconsin and the State of Wisconsin without objection, after having been duly assessed to the said grantees as provided by the statutes of the State of Wisconsin."

"That the State, relying upon these and other similar decisions, conveyed said lands to said purchasers for value and that some of said grantees in turn conveyed them to other innocent purchasers for value."

As to this claim of the defendant, we submit to the Court: That this question is not raised by the demurrer, as the bill alleges the state itself still holds and owns two sections 16.

That under the allegations of the bill, above referred to, it is alleged sufficiently that the State of Wisconsin "is legally" bound to defend and protect its purchasers and "would be liable to them for damages that they might sustain by reason of any failure of title." Manifestly, **this shows sufficient legal obligation and liability** on the state's part to entitle it to maintain the bill for the purposes of determining the title to all of the sections 16 under the great weight of authority which recognizes the right of those conveying lands to maintain such actions where they are legally interested by way of contract or warranty in the result of the controversy.

That such persons may maintain the action is admitted in defendant's brief and the admission amply supported by the cases cited in Note 91, Volume 32, Cyc., pages 1332-1333.

More than this, we believe that the fair and reasonable construction of the acts authorizing these suits contemplates that the states may bring such actions in their own name to determine the question of title of themselves and their grantees to these school lands in reservations just as much as it

does that the United States Government shall defend through its proper officer the right of any and all Indian tribes that may lay claim thereto.

Act of Congress of March 2, 1901, 31st Statutes at Large, 950.

Chapter 95 of Laws of 1903, of Wisconsin.

The purposes and object of these laws was to furnish and provide for the prompt and final determination of the rights of the State under the school land grants to the Sections 16 in the different reservations. The right of the State, which is to be decided, is both its right to hold and to convey, i. e., its title.

Congress realized that there was much of this school land the title to which had been in dispute, and that, especially in states like Wisconsin and Minnesota, a great part of such lands had been conveyed by the state to individuals, and that such land was being taxed by the state. In order, therefore, to prevent multiplicity of suits and to make the litigation simple and direct, it intended to and did, we contend, by the act of 1901, give to states, and to this plaintiff, the right and authority to main this action. The State of Wisconsin, recognizing the value of that right offered to it, in 1903, by law, also set forth hereinabove, accepted the offer and authorized its Attorney General to institute such suits. When it is remembered, that at the time of the passage of the act by Congress in 1901 and by the state in 1903, practically all of the school land had been before conveyed away by the state, it seems clear that both Congress and the State intended to cover, by their respective acts, all the school land, otherwise, the right to maintain the suit contemplated would have been more or less barren.

The Court in *Minnesota vs. Hitchcock* says: "That the United States will for the purposes of the litigation stand as the real party in interest;" and we say that under these acts the State on its part represents not only itself, but its grantees, as, necessarily, the determination of the state's right

must determine that of its grantees. That the very purpose of the Congressional Act and the Wisconsin Act was to clothe the states with authority to institute these suits, and the Courts with jurisdiction to hear them, and the United States with authority to defend the interests of itself and the various Indian tribes.

We also submit that the state in its sovereign power—outside of its legal obligation to indemnify its grantees for any loss of title—owes the grantees the duty to protect them in their estates under its grants just as the United States Government owes a similar duty to its patentees.

This duty of the sovereign power to its grantees is certainly as great and should give it equal standing in court as the mere pecuniary liability of a warrantor.

The state as sovereign has and retains continuously an interest and right in the lands. Its power to levy and collect taxes thereon and exercise other governmental functions would seem to entitle it—independently of all other considerations—to determine whether the title originally passed to the State under the Public School Grants, or is still in the Federal Government as Trustee, or guardian of the Indians.

We are inclined to believe that the right of the state to maintain an action to establish its title, for the benefit of its grantees, might well be based upon its sovereign obligation to its grantees; and with even greater force on its own interests in the collection of revenues and the exercise of other governmental control thereof.

The right of the state to maintain this action—even where it has patented the lands to others—seems to have been passed upon and decided by this court in *Wisconsin vs. Hitchcock*, 201 U. S. 202, for in the bill in that case it was alleged that patents for nearly all of the lands had been issued by the state. Statement of the cases, page 206.

It seems also to follow from the opinion in the case of *Minnesota vs. Hitchcock*, 185 U. S. 373, that this court unquestionably has jurisdiction in an action of this kind to determine the

rights of the parties under the different Indian Treaties and that the determination of the state's right necessarily involves both its rights as present owner as well as its sovereign rights, which last depend upon whether it originally took title. It is, in fact, the determination of the boundaries of the state's exercise of its sovereign function and the question is between the state and United States. Jurisdiction here seems to follow from the discussion in *Minnesota vs. Hitchcock*, pp. 383-385.

The jurisdiction of this court to determine disputes as to boundaries between the general government and one of the states of the Union or between different states of the Union is well settled.

U. S. vs. Texas, 143 U. S. 621.

The jurisdiction of this court to determine whether or not the rights of the parties are affected by the various Indian Treaties comes directly within the constitutional grant of jurisdiction. The effect of these treaties on the rights of the state necessarily involves the state's right as owner, as sponsor for its grantee and its right to exercise its governmental powers by taxation or otherwise.

The bill having alleged that the state **is legally bound** to defend the purchasers and their title and that **it would be liable to them for any damages that they might sustain by reason of any failure of title**, there can be no question of the state's right to maintain the bill in their behalf as well as in its own.

V.

We beg to suggest to the Court that the maps in defendant's brief are not official, nor in any way a part of the record.

As to the extent to which the different grants in the different treaties included the land in the present reservation, we believe them quite incorrect.

The table at page 12 of defendant's brief has several errors (doubtless due to typographical mistakes) in the descriptions and date of survey, etc.).

In this connection we call the Court's attention to the fact that the description of the reservation in the treaty ratified and proclaimed August 2, 1854, contains the following: "The same being Townships 28, 29 and 30, of Ranges 13, 14, 15 and 16, **according to the public surveys.**"

This shows that these lands were public lands, and surveyed lands, at the time of the making of the treaty.

This bill of complaint, pages 26-27, further shows that the greater part of the townships were sub-divided into sections prior to the said treaty.

VI.

Defendant's counsel, in their brief, page 18, refer to the resolution of the legislature of Wisconsin, of February 1st, 1853, as an assent on the part of the state to the creation of the reservation.

This is most clearly erroneous.

At the time the legislature passed the resolution of February 1st, 1853, the Menomonee Indians—pending their removal to the west, under the provisions of the treaty of 1848—were permitted to remove temporarily to lands in and adjacent to the present reservation. Bill of complaint, page 29.

Under the treaty of 1848, article 8, Bill of Complaint, page 22, the Indians were permitted to remain temporarily on the lands ceded and this permission was from time to time extended by the President. Bill of Complaint, Exhibits I and J.

The Resolution of the Legislature of Wisconsin of February 1, 1853, particularly refers to the "lands set apart for them by the President of the United States," and describes the land (showing that even at that time the public surveys had been largely made) as "commencing at the Southeast corner of Town 28, North, Range 19, running thence West thirty miles, thence North eighteen miles, thence East thirty miles, thence South eighteen miles, to the place of beginning." Thus taking in fifteen townships of land—the present reserva-

tion contains twelve—and nine of the fifteen Townships being Easterly of the present reservation, and only six of the Townships mentioned in the Resolution of the Legislature being within the limits of the present reservation.

The Treaty creating the present reservation was not negotiated until some 15½ months later, when the Indians and the United States Agent met, on May 12, 1854, at the Falls of the Wolf River. Bill of Complaint, page 23.

The court will note that on February 1, 1853, the Treaty of 1848, providing for the removal of the Indians West of the Mississippi, was still in force. That they were remaining in Wisconsin only temporarily, under the President's order—pending their removal West.

That the Menomonees were then located around Lake Winnebago and Fox River, and that the Government was then offering these lands for sale, and that they were temporarily allowed to remove Northeasterly on to lands which were, for the most part, not covered by the Treaty of 1848, but had been ceded by the Treaty of 1836. That the State's title to section 16 in all the land was recognized and its consent to the temporary removal sought. We submit that this consent to the temporary removal of these Indians, if valid, can not be tortured or construed into the grant of a permanent right, and cannot by any possibility be considered as an assent to the Treaty negotiated more than fifteen months afterwards, and ratified in August, 1854.

Certainly, the State of Wisconsin had no such idea, and the acts of all the parties gave it no such construction. The State claimed ownership and conveyed away parts of said section 16. Bill of complaint, page 27. The State has taxed said lands. Bill of Complaint, page 30.

On the other hand, none of the Indians ever lived on these sections 16, claimed by the State.

Bill of Complaint, page 31.

No claim was made by the Menomonee Indians or the

Government that the State and its grantees did not own these school sections. Bill of Complaint, page 32.

It is also very clear that these sections 16, being school lands, could not be disposed of nor diverted to any other use by the State Legislature. Constitution of Wisconsin, Article 10, Sections 7 and 8.

State ex rel, Sweet vs. Cunningham, 88 Wis. 81.

VII.

Counsel, after somewhat frankly admitting that at least some of the sections 16, here involved, had been identified by public survey prior to the Treaty of 1854, contend that the lands were, nevertheless, burdened with the Indian's right of occupancy and that the mode and extent of their enjoyment of such occupancy is not in any manner limited, except by the discretion of the governmental department in charge of Indian affairs and the acts of Congress. To this proposition we cannot agree.

For the purpose of the argument on this motion to dismiss the plaintiff's bill, the allegations of the bill, including the paragraphs 36 to 41 inclusive, are to be taken as true. The existence of a saw mill, its use by the said Tribe, for cutting timber for commercial purposes; the abundant amount of timber available for said Indians, exclusive of that on Sections 16, the actual cutting by said Indians of timber on some of said Sections 16, and the threat to cut it all for manufacture into lumber and subsequent sale; the fact that the value of said Sections 16 is largely in the timber thereon, and that none of said cutting or threatened cutting was done or contemplated for improvement of the land, and that none of said Indians ever lived on said Sections 16, stands admitted, at least, for the present.

If this court should be of the opinion that the unincumbered fee is not in the State, in spite of the conveyance to the State of Wisconsin by the United States of these Sections, and the ceding by the Indians to the United States of all their land in Wisconsin in 1848, and the termination of the tem-

porary occupancy granted to said Indians, of certain lands in Wisconsin, not involved in this action, in October, 1852, and before any attempt was made to set aside a home in Wisconsin for said Indians, and the definite identification of said sections by surveys of the township and the sub-division thereof into sections before the treaty of August, 1854, the complainant nevertheless, contends:

1st: That the United States cannot cut the timber from said sections, because it transferred its legal title thereto, to the State of Wisconsin, in May, 1848, when said State was admitted into the Union.

2nd: That the Menomonee Tribe of Indians cannot cut said timber for purposes of manufacture and sale, because, granting that they have some interest in the said lands, at best that interest can not be more extensive than the interest which they have in other Indian lands, being an interest no greater than that of a life tenant. If these two propositions are tenable, it follows as a necessary corollary, that the State of Wisconsin owns the legal title to the said lands and the timber which is a part thereof, and is entitled to relief from the cutting of such timber by the United States or the Indians.

We believe it to be res adjudicate, under the decision in the case of *Beecher vs. Wetherby*, 95 U. S. 517, 24 L. E. D. 440, that the United States parted with its legal title to these Sections 16, to the state in May, 1848, and that all that remained thereafter to be done, and all that legally could be done, was to identify them by appropriate surveys, which were made.

The *Beecher* case involved the question of the ownership of Section 16, Township 28, Range 14, which was within the limits of the land the United States attempted to set apart for the Menomonee Indians, by the treaty of 1854. This particular section, with other land in said Reservation, was afterwards ceded to the Munsee and Stockbridge Tribes, but its history, up to that time was identical with all the rest of Sections 16 in said Reservation.

After stating that the township embracing this particular Section 16 was surveyed in October, 1852, and sub-divided in May and June, 1854, the opinion says: "With this identification of the section, the title of the state, upon the authority cited, (*Cooper vs. Roberts*, 18 Howard 173) became complete, unless there had been a sale or other disposition of the property by the United States PREVIOUS TO THE COMPACT WITH THE STATE. No subsequent sale or other disposition, as already stated, could defeat the appropriation."

"But the right which the Indians held was only that of occupancy. THE FEE WAS IN THE UNITED STATES, subject to that right and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee and could not disturb the occupancy of the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court, from the foundation of the government."

The decision there, has never been questioned, modified, or overruled; has stood the test of nearly 40 years and is, we believe, controlling here, and decisive of the fact that since May, 1848, the United States had no legal title to the fee in any sections 16, in the Menomonee Reservation, and that such fee has always, since that date, rested and now rests in the State of Wisconsin and its grantees.

Therefore, the United States cannot cut the timber from these lands. It belongs, together with the land, to the owner of the fee, the state and its said grantees.

Complainant contends, that, at the most, and viewing the question from the angle most unfavorable to it, the right of the Indians in any of said sections 16, is limited by *Beecher vs. Wetherby*, to that of occupancy, and that such right of occupancy is exactly co-extensive with the right of a tenant for life, in land and that therefore, the Indians have no right or shadow of a claim to a right, to cut this timber for manufacture into lumber and sale.

Under the terms of the treaty of 1854, whereby the United

States attempted to give to the Indians, the said Reservation, the land was to be held by them "as Indian lands are held." Art. 2, Treaty of 1854, Bill of Complaint, page 24.

The question of how extensive such right of occupancy is, seems to have been determined by this court many years ago, in the case of *United States vs. Cook*, 86 U. S. 591, 22 L. E. D. 210. This case had to do with the title to certain of the land which, in 1831, was ceded by the Menomonee Indians as a home for the New York Indians. It was stipulated in the treaty that such land was to be held by the New York Indians under such terms as the Menomonees held their lands. Treaty of 1831, Article One.

Some time thereafter, some of the Oneidas, a tribe of New York Indians, ceded to the United States all the land set apart for them, except a tract containing one hundred acres for each individual, in all, about 65,000 acres, which they reserved to themselves to be held as other Indian lands were held. Of this tract, some 3 or 4 thousand acres were actually occupied and cultivated as farming lands by individuals of the tribe in severalty. Some of the tribe cut timber from a part of the Reservation not occupied in severalty, manufactured it into saw logs and sold it to the defendant. The United States then brought an action of replevin, to recover possession of the logs.

The court, in this case, not only disposed of the question of what the Indian's right of occupancy was, but likened it to the right of a tenant for life, and applied the general rule of law pertaining to such right, to that case.

The opinion, by Mr. Justice Waite, in part, says: "That right of the Indians in the land from which the logs were taken was that of occupation alone. They had no power of alienation, except to the United States. This is the title by which other Indians hold their lands. This right of use and occupancy by the Indians is unlimited. They may exercise it at their discretion. If the lands in a state of nature are not in a condition for profitable use, they may be made so. If desired for the purpose of agriculture, they may be cleared of

their timber to such an extent as may be reasonable under the circumstances. The timber taken off by the Indians in such clearing, may be sold by them. BUT TO JUSTIFY ANY CUTTING OF THE TIMBER, EXCEPT FOR USE UPON THE PREMISES, AS TIMBER OR ITS PRODUCT, IT MUST BE DONE IN GOOD FAITH FOR THE IMPROVEMENT OF THE LAND. THE IMPROVEMENT MUST BE THE PRINCIPLE THING, AND THE CUTTING OF THAT TIMBER, THE INCIDENT ONLY. ANY CUTTING BEYOND THIS WOULD BE WASTE, AND UNAUTHORIZED.

“The land cannot be sold by the Indians, and consequently, the timber, until rightfully severed, cannot be. It can be rightfully severed for the purpose of improving the land or the better adapting it to convenient occupation, BUT FOR NO OTHER PURPOSE. If the timber should be severed for the purpose of sale alone, in other words, if the cutting was the principle thing, and not the incident, then the cutting would be wrongful, and the timber when cut, become the absolute property of the United States. It was not taken from any portion of the land which was occupied, or, so far as it appears, intended to be occupied for any purpose inconsistent with the continued presence of the timber. It was cut for sale and nothing else. Under such circumstances, when cut, it became the property of the United States absolutely, discharge of any rights of the Indians therein. The cutting was waste.”

In this case, the lands, sections 16, from which the timber has been cut, and from which the Indians threaten to cut all the timber, are not occupied in severalty by the Indians; it is not even pretended that such cutting was, and is to be done for the purpose of improving the land; the continued presence of the timber is not inconsistent with any occupancy, past or present, of the Indians; the cutting was, and is to be purely for the purpose of manufacture into lumber at the Indian saw-mill at Neopit, and subsequent sale, and such cutting was, and is to be the principle thing, and not incident to improvement.

So far as the right of the Indians to cut is concerned, this

case is on all fours with the Cook case; its facts bring it squarely within those of that case, and the rules of law laid down there seem, of necessity, to be controlling here. The cutting and threatened cutting here was, and is only for the purpose of manufacture and sale, and any clearing which might be done would only be incident to such manufacture and sale, and therefore, was and would be wrongful and unlawful, and the committing of waste by the life tenants, to the irreparable harm of the remainder-men, the State of Wisconsin and its grantees, who own the fee.

The state and its grantees occupy, in this case, the same position, and are clothed with the same rights as to the timber involved herein, as the United States did in the Cook case. They own any timber which may have been wrongfully severed from their land, and are also fairly entitled to protection from this court, against any further wrongful cutting.

We believe that the foregoing answers all of the questions raised by defendant's counsel, and clearly establishes our right to maintain this Bill in its present form.

We feel that there can be no question of the jurisdiction of a court of equity in a case of this kind, to determine and quiet the title. That the allegations of great damage done and threatened, and of the inadequacy of any other remedy, entitle us to maintain this bill.

The removal of the cloud cast upon our title by the claims of the defendant, and the Menominee Indians, and by their acts as well, can only be decreed in equity.

The damage to our property done and threatened, by the defendant and the Menominee tribe, peculiarly call for the relief prayed in the form of an injunction.

It probably is enough to say, in the present case, that suits of this kind are specially authorized to be brought and maintained in the manner here followed by the Act of Congress of March 2, 1901, and that equity having taken jurisdiction, will exercise all necessary powers and furnish all necessary remedies to protect the rights of the complainant.

The jurisdiction of equity to protect us against the threatened damage and waste is well recognized.

Williamson vs. Jones, 43 W. Va. 562.

Porch vs. Fries, 18 N. J. Eq. 204.

1 Washburn Real Property, 4th ed., page 160.

Coosaw Mining Co. vs. State of South Carolina,
144 U. S. 564.

Bell vs. North America Coal & Dock Co., 155 Fed. 712.

IN CONCLUSION.

We submit that the rights of the State of Wisconsin, and its grantees in and to the 16th sections of each township in the Menominee Reservation (excluding those townships set off to the Stockbridge and Munsee Indians) are well founded, as shown by the allegations of the original bill of complaint.

That the motion to dismiss the bill should be denied, and judgment awarded to the complainant as prayed, unless the defendant ask for and be given leave to now answer.

Respectfully submitted.

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Attorney General of Wisconsin.

JOHN C. THOMPSON, M. G. EBERLEIN,

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Of Counsel.

Office of the Secretary of the State

St. Louis, Mo.

NOV 23 1917

JAMES D. BAKER

CLERK

Original No 7.

In the Supreme Court of the United States

OCTOBER TERM, 1917

THE STATE OF WISCONSIN

vs.

FRANKLIN E. LANE
Secretary of the Interior

In Equity

BRIEF AND ARGUMENT FOR COMPLAINANT

WALTER C. OWEN,

Attorney General of Wisconsin

JOHN C. THOMPSON,
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E. A. HOLLESTER,

Of Counsel

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POOR COPY



IN SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

THE STATE OF WISCONSIN,

v.s.

FRANKLIN K. LANE,
Secretary of the Interior.

} Original No. 7.

} In Equity.

BRIEF OF COMPLAINANT.

The bill of complaint was filed to have determined the title of the State of Wisconsin and its grantees to the Sections 16 (school sections) within the boundaries of the Menominee Reservation in Wisconsin; to remove the cloud on complainant's title caused by the adverse claims and acts of the defendant, acting for the United States, and to prevent the doing of irreparable damage and the committing of waste thereon by the threatened removal of the timber. The bill alleges the inadequacy of other relief, and prays an injunction.

The bill was filed at the October, 1912, term, and thereafter the defendant, under the new equity practice, moved to dismiss the bill, and briefs were filed and oral argument had before this Court which thereafter denied the motion to dismiss and thereafter the defendant answered, replication was filed and testimony taken and the case is now before the Court for final determination. The testimony is reported without findings of fact or conclusions of law pursuant to the order of this Court.

STATEMENT OF MATERIAL FACTS.

(CHRONOLOGICALLY ARRANGED)

There is little dispute as to the facts. A very large part of the evidence is of a documentary and historical nature.

•We are here endeavoring to set forth a brief outline of the material facts.

The land in controversy is probably within the general description of the Menominee lands as described in the Treaties with the Menominee Indians of 1825 and 1831.

However, their actual homes were for the most part far south and east, along the shores of Green Bay, Fox River and Lake Winnebago, and also southeasterly of the Fox River—in fact, their claims extended as far south as Milwaukee, covering a very large part of what is now the State of Wisconsin.

By the Treaty of 1831, third subdivision, the Menominees gave up all claim to the lands southeasterly of Winnebago Lake, Fox River and Green Bay.

It was further provided by the fourth subdivision that certain specified lands, then occupied by the Menominees, should be set apart and designated for their future homes, upon which their improvements as an agricultural people were to be made. This land is described in the Treaty and lies between the lower Fox, Lake Winnebago, the upper Fox, and extends a ways up the Wolf River, but *does not include any part of the present reservation.*

These lands were thenceforth to constitute their reservation except as the treaty in its sixth paragraph provided that the remainder of the unceded lands adjoining their farming country should remain to them "for a hunting ground, until the President of the United States shall declare it expedient to extinguish their title," and in which case they then promised to surrender them immediately.

By the Treaty with the Menominees, of September 3, 1836, the Menominees ceded to the United States certain lands, including the lands between the Fox River, lower Wolf, Lake Winne-

bago and upper Fox, and which cession also included the eastern part of what is now called the Menominee Reservation. Exhibit 69 in Record.

Thereafter the Indians remained northerly of the upper Fox and westerly of the lower Wolf, and in and about Lakes Poygan and Winneconne (Pow-aw-hay-kon-nay).

By Act of Congress of August 6th, 1846, 9 Statutes at Large, 56, the people of the territory of Wisconsin were authorized to organize a state and by that act there was submitted to the convention which should assemble for the purpose of forming a constitution for the State of Wisconsin, for acceptance or rejection, certain propositions. The first of which was:

"1. That Section numbered 16 in every Township of the public lands in said state, and where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, *shall be granted to said State for the uses of schools.*"

These provisions were promised on condition that the convention should provide by a clause in the state constitution or by an ordinance irrevocable without the consent of the United States, that the State would never interfere with the primary disposal of the soil within it, etc., and the act provided that if the propositions were accepted by the convention and ratified by an article in the constitution that *they should be obligatory on the United States.*

The convention accepted the propositions and ratified them by an article in the constitution, and performed all the provisions required by the act of admission.

It was therefore an unalterable condition of the admission, *obligatory on the United States, that Section 16 in every Township of the public lands in the State which had not been sold or otherwise disposed of, should be granted to the State for the uses of its schools. . . .*

At that time more than two-thirds of the State of Wisconsin—and in fact all of the unsettled part—was claimed by different bands of Indians, but manifestly all these lands were intended to

be covered by the provision giving sections 16 to the State for school purposes.

Wisconsin was admitted into the Union, May 29th, 1848.

The constitution of Wisconsin was adopted February 1st, 1848, and the provisions thereof, in compliance with the provisions of the enabling act, will be found in Section 2 of Article II thereof.

It will be noticed that at this time the Menominee Indians' home was around Lake Winneconne (Wah-na-kun-nah), which was in the treaty of 1836 called "their own country," though quite likely some few of them were at different points along the Fox River and Green Bay, as the treaty of 1836 was made at Cedar Point on the lower Fox River.

By the enabling act of 1846 and by the acceptance of the State of Wisconsin in its constitution of the propositions contained in the enabling act, it was understood that the State acquired Sections 16 in all these lands in Wisconsin both southeasterly and northwesterly of the Fox River.

In recognition of the understanding the Government proceeded to provide for the removal of the Indians and entered into the treaty with the Menominees of October 18th, 1848, ratified January 23rd, 1849.

By this treaty the Menominees *ceded, sold and relinquished for a valuable consideration* all their lands in Wisconsin. See Article 2 of said treaty.

Other lands were given them farther west as well as \$350,000 in money. Provision only being made by Article 8 that the Indians might be permitted to remain on the ceded lands for two years from the date of the treaty "and until notified by the President."

This was clearly a release by the Indians of any claim or right to all these lands.

The fact that the Indians had ceded all their lands in Wisconsin was well understood and recognized by the Indians as will appear from a brief reference to their petition, Ex. "A" to the original bill, page 37. Transcript page 29.

It further appears from said petition *that they had then been notified that the United States would expect them to remove to the new home set apart for them by the 18th of October, 1850, in accordance with the provisions of the treaty.*

It is therefore apparent that the Indians' right to remain on the land *had been terminated by the President* in accordance with a provision of the treaty and as provided therein. The original order cannot now be found, but the fact that the petition of the Indians recites the making of the order and that the subsequent order of the President accepts such "recital" as a fact and extends the time for removal, are consistent with no other theory and at this late day must be proof conclusive of the existence of such order.

The evidence shows that papers are sometimes mislaid and cannot be found. See evidence as to letter of Alex H. H. Stewart. Transcript of Record 231.

These executive orders were on that day rather informal, some of them merely endorsed by the President on the backs of letters. Transcript 231.

In accordance with the petition of the Indians, President Fillmore, under date of September 5th, 1850, (original bill, page 41), extended to them permission "to remain temporarily" until the first day of June, 1851, "*provided they do not interfere with any surveys which may be ordered, and they must not understand this as granting any indulgence beyond that time.*" This time was subsequently extended by the President to June 1st, 1852. See Ex. "I" to original bill, and again to October 1st, 1852; see Ex. "J" to original bill.

The allegations of the bill as to these extensions are found in subdivision XXIX of the Bill (Transcript 23) and are admitted by subdivision 29 of the answer. Transcript 53.

During this time the public surveys of the ceded land were being made and so far as the 10 sections here involved are concerned the dates of survey are as follows:

SURVEY

T. 30 N. R. 15 E.

Survey commenced June 16th, 1851.

Subdivisions completed September 11th, 1853.

Survey approved by Surveyor General, February 20th, 1854.

T. 28 N. R. 16 E.

Survey commenced October 18th, 1852.

Subdivisions completed September 13th, 1853.

Survey approved by Surveyor General, February 20th, 1854.

T. 29 N. R. 16 E.

Survey commenced October 20th, 1852.

Subdivisions completed September 12th, 1853.

Survey approved by Surveyor General, February 20th, 1854.

T. 30 N. R. 16 E.

Survey commenced June 13th, 1839.

Subdivisions completed July 29th, 1853.

Survey approved by Surveyor General, February 20th, 1854.

T. 29 N. R. 13 E.

Survey commenced October 24th, 1852.

Subdivisions completed July 31st, 1854.

Survey approved by Surveyor General, October 11th, 1854.

T. 29 N. R. 14 E.

Survey commenced October 25th, 1852.

Subdivisions completed July 7th, 1854.

Survey approved by Surveyor General, October 11th, 1854.

T. 28 N. R. 15 E.

Survey commenced October 5th, 1852.

Subdivisions completed May 27th, 1891.

Survey approved by Commissioner of General Land Office.

August 28, 1891.

T. 29 N. R. 15 E.

Survey commenced October 26th, 1852.

Subdivisions completed July 2nd, 1891.

Survey completed by Commissioner of General Land Office.

October 3rd, 1891.

T. 30 N. R. 13 E.

Survey commenced June 16th, 1851.

Subdivisions completed November 21st, 1854.

Survey approved by Surveyor General, February 6th, 1855.

T. 30 N. R. 14 E.

Survey commenced June, 1851.

Subdivisions completed November 3rd, 1854.

Survey approved by Surveyor General February 6th, 1855.

See transcript of record, pages 64, 68; 236, 237; 293, 298.

It will be noticed that in the first four townships above mentioned the Sections 16 were completely surveyed and the surveys approved before the Treaty of August 2nd, 1854, and that the surveys of all the Townships here involved were commenced long before that Treaty and in 1851 and 1852.

Both the United States and the State of Wisconsin recognized the fact that the Treaty of 1848 had relieved the land of the claims of the Indians, and these public surveys were being made on that theory.

The construction placed upon the Treaty by the State is evidenced by contemporary documents. See Ex. "G.," Transcript of Record 39, where the Governor says, "the Indian title to which has now become extinct."

Also the language of the Treaty of 1848 itself is "do hereby cede, sell and relinquish to the United States all their lands in the State of Wisconsin," and for which they received a valuable consideration in western lands as well as \$350,000.00 in money.

Transcript of Record 16-18.

The general recognition of the state's interest in these Sections 16, by both the United States and the Indians, is further shown by the fact that when these Menominees removed temporarily to the lands at the Falls of the Wolf and the Oconto Rivers it was deemed necessary to get the consent of the State to their occupancy of such lands. Transcript 409.

It will also be noted that the United States all through this particular time was most careful to take every precaution that no

act it took in its dealings with the Indians should interfere with the public surveys then going on or interfere with the legal effect thereof.

We see that in the President's order of September 5th, 1850. (Ex. "B," Transcript 31-32) the permit was on the condition "Provided they (the Indians) *do not interfere with any surveys.*" The recommendation of the Commissioner of the General Land Office of May 28th, 1851, for a further extension (Exhibit "I," Transcript 40) states, "on condition that they *do not interfere with the surveys* and that this extension of time is an act of favor," and the President's order of June 2nd, 1852, was "according to the recommendation." Exhibit "J," Transcript 41.

In report of the Commissioner of Indian Affairs of November 27th, 1851, referring to the temporary extension of time to remain in Wisconsin, given them by the President, the Commission says, that such consent was given "on condition, however, that they should not interfere with the public surveys, and with the distinct understanding that this extension of time was to be considered as an act of favor." Transcript, page 248.

The last order of the President extending the Menominee Indians' time to remain in Wisconsin is that of June 1st, 1852, and extended their time until October 1st, 1852. See Exhibit "J," Transcript 41.

The Menominee Indians were then located mainly in that part of their former lands set apart for them as their "homes" in the Treaty of 1831, and other bands were evidently situated between the Oconto River and the shores of Green Bay.

Neither of these places were within the present reservation.

Transcript, pages 238 and 264.

There was some trouble with the Indians over their removal to points West of the Mississippi, and the Secretary of War was at one time advised that "a state of affairs has arisen," "which requires the presence of a military force there." Transcript 264.

REMOVAL OF MENOMINEES TO WOLF AND OCONTO RIVERS.

Under date of September 30th, 1851, Elias Murray, Superintendent of Indian Affairs at Green Bay, wrote the Commissioner of Indian Affairs with reference to an exploration he had made of a Northern location for the Menominee Indians, and recommended a tract of land commencing at the South West corner of Township 28, on the Range line between 19 and 20, and run West (by calculation) thirty miles—thence North eighteen miles—thence East thirty miles—thence South eighteen miles to the place of beginning. Transcript 274.

This tract embraces the two Eastern ranges of the present Menominee Reservation, and in addition the three ranges Easterly of the present Reservation.

Nothing was done with this matter at that time, and as hereinbefore stated, the Government insisted on the removal of the Menominee Indians West of the Mississippi, excepting that by the President's orders hereinbefore referred to, their time for such removal was extended until October 1st, 1852.

The Act of Congress of August 30th, 1852, Chapter 103, Vol. 10 U. S., Statutes at Large, commencing at page 41, and on page 47 contained an appropriation providing for the *temporary removal* of the Menominee Indians from their then place of abode to the new location on the Wolf and Oconto Rivers, and is as follows:

"Menominee,—* * * * *.

For expenses of their *temporary removal* and provisions, from their present location, to the District of Country on the Wolf and Oconto Rivers designated in the report of Superintendent Murray to the Commissioner of Indian Affairs, dated September 30th, 1851, \$25,000.00."

The Menominees from Lake Pow wa-ha-conna (now Lake Poygan and Winneconne) as well as those living on the Oconto and Menominee Rivers near Green Bay, were removed to their new temporary quarters, commencing in October, 1852, as is shown by the contemporary reports and other documents. Re-

port of Superintendent of Agency. Transcript 238; Report to Superintendent. Transcript 239-240; Report of Commissioner of Indian Affairs. Transcript 240; Extract from letter of sub-agent of Indian Affairs. Transcript 240-243; Letter of Indians. Transcript 276.

In the last, the Indians speak of *our new homes on the Wolf and Oconto Rivers*" and say: "We have just been removed from *our old homes*."

There was offered in evidence by the defendant a part of the survey of the North and South line between Sections 20 and 21, Township 28 North, Range 16 East, showing that in running the line, they crossed an Indian corn field and passed an Indian blacksmith shop. Transcript 304-305.

This was doubtless intended to suggest that some Indians were then residing in this Country.

As the survey was commenced in July, 1853, and finished in September, 1853, it was after the Menominees were removed to this Country in the Fall of 1852, and it is possible that some of them had located on this Section, but this particular Township was part of the land ceded by the Government to the Indians in 1836, see map Exhibit 69 in record, and it is evident that if the Indian corn field and blacksmith shop belonged to the Menominees, it must have been to such of them that had moved there in 1852, and it is more probable that it may have been Oneidas, as their lands bordered on, and in fact at that time included the South East corner of what is now the Menominee Reservation.

There was also some rather loose testimony by the present Indian agent, Mr. Nicholson, as to what he had been told, and what he judged as to the ages of houses by looking at them. Transcript, pages 123-125.

It is, however, evident from the whole record that the Indians did not occupy the present Menominee Reservation prior to their being moved up there in the Fall of 1852, and it is equally evident that with the exception of one or two Indians who have little clearings, there are none of the Indians now living on Sections 16. Transcript 121-125.

THE NEW LOCATION WAS ONLY TEMPORARY.

This new location was, however, clearly intended as a "temporary" arrangement.

That is the *wording of the Act of Congress*.

It was so regarded by the Indians who within two months sent a delegation to look at the country northeasterly on the Oconto, thinking it might be "a more favorable point than our present location." See letter of Indians of December 6, 1852. Transcript 473.

That it was at the time of the removal in 1852 not a permanent location, and not so considered by the officials of the Department of the Commission of Indian Affairs, is shown by extract of letter to the Commissioner by the Superintendent of Northern Superintendency, dated September 26, 1853, in which he says: "By treaty with the Menominees, made in 1848, their removal west of the Mississippi was contemplated, but from representations made to the Department, it was thought preferable to concentrate them on the upper Wolf and Oconto Rivers in this state, and accordingly they were removed there in November of last year, and the consent of the Legislature of Wisconsin to that arrangement was obtained. *If they should be permitted to remain there*, further legislation on the part of Congress would be necessary to provide for their education and agricultural improvement." "It would be desirable that the question of their *permanent location* should be settled as soon as practicable, as uncertainty retards their progress and is a great detriment to the tribe." Transcript 249.

The temporary character of their occupancy is further shown by extract of letter from Geo. W. Manypenny, Commissioner of Indian Affairs, to the Secretary of the Interior, dated September 26th, 1853. After referring to their removal, the letter states: "If, however, this arrangement *is to be* of a permanent character, a new convention with them will be necessary." Transcript 250. Also see letter of J. M. Edmund to Hon. Winfield Smith, Governor of Wisconsin, under date of February 8th, 1865, in which the following appears: "In 1853 this township was *temporarily* set apart for the use of the Menominee Indians, not, however, by

treaty stipulation, but by agreement between the general Government and the Menominees, with the assent of the State of Wisconsin." Also in the same letter, "The title to the lands never passed out of the United States by the *permission* given to the Menominees to occupy them, but was simply an arrangement made to meet certain exigencies, and lasted but two years." Transcript 195.

It will be further noted that nearly all of this land which the Menominees were allowed to occupy temporarily was land that had been ceded absolutely by the Menominees to the United States by the Treaty of 1836.

The land to which the Menominees were temporarily removed at this time (1852) on the Wolf and Oconto Rivers was the land described in Murray's report in 1851, Transcript 274, and it was the "temporary" remaining on this particular land to which the State of Wisconsin attempted to give its consent by the joint resolution of February 1st, 1853, printed in the Transcript, at page 244.

The land—described in Murray's report—to which the Indians were so temporarily removed, and land described in the joint resolution of the Legislature of Wisconsin, above referred to, was in Ranges 15-16-17-18 and 19, Townships 28-29 and 30 North..

Ranges 19-18-17 and the major part of 16 were all ceded by the Treaty of 1836 by the Menominees, and only Range 15 and the smaller part of Range 16 (which would not include more than one Section 16 in Range 16) were included in the Session made by the Treaty of 1848, see Exhibit 68, map in record—a copy of which map will also be found in the brief of the Government on the motion to dismiss the original bill, and is there marked map "1."

The survey of a part of this land had been completed as early as 1846. Commissioner Edmond's letter, Exhibit 76, Transcript 195.

The land on which the Menominees were temporarily located in 1852, and to which temporary location the assent of the State

was attempted to be given by the joint Resolution of February 1st, 1853, was not the same land which was afterwards included in the Treaty with the Menominees of 1854.

The Treaty of 1854 only covered Ranges 13, 14, 15 and 16, in Townships 28, 29 and 30. Transcript 18-20.

By that treaty, the United States set apart for the Menominees "*for a home to be held as Indian lands are held,*" that tract of country lying upon the Wolf River in the State of Wisconsin, commencing at the South East corner of Township 28 North of Range 16 East of the fourth principal meridian, running West 24 miles, thence North 18 miles, thence East 24 miles, thence South 18 miles to the place of beginning, the same being Townships 28-29 and 30 of Ranges 13-14-15 and 16, according to the "*public surveys.*"

A reference to "map one," Exhibit 68 in the record, and a copy of which is attached to the Government's brief on the motion to dismiss the bill will show that the land covered by this Treaty of 1854 was different from that on which the Indians were located temporarily in 1852.

Ranges 17-18 and 19 of the temporary location not being included in the land covered by the Treaty, and there being added the six townships in Ranges 13 and 14, Townships 28-29 and 30.

It will also be noticed that the description of the lands covered by the Treaty were "*according to the public surveys,*" and this calls attention to the fact that the same "public surveys" which identified the school lands given to the State by the Act of Congress of August 6th, 1846, also identified the lands covered by the Treaty of 1854, as their description in the Treaty was "*according to the public surveys.*"

The Treaty of 1854 was not ratified nor proclaimed nor effective until August 2nd, 1854.

CONTEMPORARY CONSTRUCTION OF PARTIES.

The State of Wisconsin at the outset never questioned but what it was the owner of the School Sections in the Menominee Reservation, and commenced selling the same for value to bona fide purchasers.

In the Transcript, pages 287-291, are a list of sales of lands in these Sections 16 made by the State, and from that it will be noticed that all of Section 16, Township 28, Range 16 East, and all of Section 16, Township 29, Range 14 East, and all of Section 16, Township 30, Range 13 East, and all of Section 16, Township 30, Range 14 East, and all of Section 16, Township 30, Range 15 East, and all of Section 16, Township 30, Range 16 East were sold as early as July, 1857.

Other sales are shown on the list from that time down, some in 1858, some in 1859, in 1863, in 1864, and in the others years down to the 80's.

In the record are shown the forms of contracts (Transcript 283-284), and of conveyances (Transcript 286-287) used by the State in making the sales.

These conveyances conveyed the entire estate in the lands.

The State understood that the Treaty of 1848 had extinguished the Indian title to all the lands theretofore occupied by the Menominees. See letter of Governor Farwell in 1852, Transcript 39. Also letter of the Governor's Secretary to the Honorable C. C. Washburn, Transcript, page 40, and it may be added that the Secretary of the Interior ruled that the Treaty of 1854 did not divest the title of the State to the swamp lands in said Reservation. See Exhibit "C," Transcript 32.

The State of Wisconsin always understood that it owned absolutely, and has always claimed the Sections 16, and as we have seen, sold and patented the whole estate in said lands to bona fide purchasers for value, and a large part of these sales were at a very early date.

The last vestage of title of the Indians under their former occupancy terminated in October, 1852, at the expiration of the last extension given them by the President, and the temporary removal of the Indians to the head waters of the Wolf and Oconto was a mere temporary license which was not intended to give them any estate or interest in the lands, and the subsequent Treaty of 1854, after the public surveys had been completed and approved, with the exception of the subdividing of a

few sections, was not understood by the State to change the ownership of the Sections 16 belonging to the State, although the outer boundaries of the Reservation might embrace them.

BEECHER VS. WETHERBY.

By a subsequent treaty a portion of the Menominee Reservation was ceded to the Stockbridge and Munsee tribes and under act of Congress of February 6th, 1871, a portion of the Stockbridge and Munsee townships were directed to be sold. A conflict arose as to the title of a portion thereof and as to the ownership of the logs cut therefrom, which resulted in the matter being brought before this court on appeal, the decision whereof is reported under the title of *Beecher vs. Wetherby*, 95 U. S. 517. The plaintiff claimed under patents from the United States issued on the sale under the act of 1871. The defendant asserted title under patents of the State of Wisconsin issued in 1870, and the title under the State patent was upheld.

The decision of this court in that case that Congress intended to vest in the State the fee to the Sections 16 in every township has since 1877 been accepted as a rule of property with relation to all the sixteenth sections in the Menominee reservation.

The decision of this court that the fee vested in the State has been relied upon ever since by those purchasing said sections from the State and from the grantees of the State, and a great deal of property has been acquired by different individuals in reliance upon said decision.

The decision in *Beecher vs. Wetherby* has been accepted, ratified and confirmed by many decisions of the different Governmental Departments, and it has been relied upon by the grantees of the State in purchasing the same and by the purchasers from them, and has formed the basis of many contracts and agreements entered into between the owners under the State title, the United States and the Indians.

J. A. Williams, Commissioner of the General Land Office, in a letter to the Department of Public Lands of the State of Wis-

consin, at Madison, under date of December 6th, 1880, relative to the status of School Sections, held,

"That the title of the Indians to the lands embraced in said reservation is only that of occupancy, and that the fee to the sixteenth section referred to is in the State subject to the right of occupancy by the said Indians." Transcript, page 32.

In re Henry Sherry, (Decisions of the Department of the Interior, Volume 12, page 177), Judge Shields says,

"Under the rulings of Beecher vs. Wetherby, it would seem to be clear that the fee simple to the School Sections within the present Menominee Reservation had passed from the United States to the State of Wisconsin, yet being subject to the Indian right which yet exists." Transcript, pages 34-39.

In letter of the acting Commissioner to the Indian Agent of November 12th, 1897, it was stated,

"I have to say that you totally misapprehend the position of this office on the question. The office stated that the Menominee Indians received by their Treaty only the right of occupancy of all lands within their reservation. By acts of Congress, the State of Wisconsin had previously to the final setting apart of this reservation been granted the sixteenth sections. This was subject to the Indian rights of occupancy. The Indian right of occupancy does not carry with it any right to cut timber for the purpose of sale, or to open lines, except for the use of the Indians on the Reservation. By the Act of June 12th, 1890 (26 Chap. 146), the United States gave, as a gratuity to the Menominee Indians, the right to cut and sell the timber on their Reservation. The effect of this act was merely a relinquishment by the United States of this reversionary interest in the timber upon that part of the Reservation to which the United States held the fee simple title, it was not the purpose of Congress by that act to give away to the Indians the timber upon the sixteenth sections which would become the absolute property of the State on its being wrongfully severed from the soil. You are there-

fore instructed that it would be a trespass against the State to permit the Indians to cut timber on the sixteenth sections within their Reservation, except for such purposes as may be necessary to give them the full enjoyment of their occupancy right of the land." Transcript 171.

In a letter of Acting Commissioner Toner, in reference to cutting timber on Section 16 of the Menominee Reservation, dated October 6th, 1897, the Commissioner quotes the rule laid down in *Beecher vs. Wetherby*, and adds,

"While therefore the ultimate fee to all the rest of the Menominee Reservation is in the United States as in other cases, the fee to Section 16 of each Township in that Reservation, is in the State of Wisconsin, subject to the right of the Indians to occupy the same, and the State has the power to dispose of this fee and to patent the lands to her grantees. The grantees, however, would take only such rights as the State had, viz: The naked fee, the occupancy being in the Indians, which occupancy can only be disturbed or determined by this Government." Transcript, pages 213-214.

A copy of this letter was sent to the Indian Agent for his instruction as to the rights of the respective parties. Transcript, page 212.

There are other similar rulings and holdings of the department mentioned in the different cases involving school sections which we will not take the space to quote here.

BEECHER VS. WETHERBY AS A RULE OF PROPERTY.

It appears from the testimony that the Paine Lumber Company, in purchasing the timber on Sections 16, Township 30, North of Range 13 East, in 1889, advised with its attorneys, and relied upon the State's title to the fee being established by the decision in *Beecher vs. Wetherby*. That decision was regarded at that time by members of the bar and lumbermen and timbermen in this part of the country as establishing the State's title

to Sections 16 in the Reservation. Nevitt's Testimony. Transcript 157-158.

The decision of the Supreme Court of the United States in the case of Beecher vs. Wetherby was well known to the members of the bar of eastern and northern Wisconsin, at and after the time it was rendered.

When the decision was first rendered, it was talked of a good deal. Beecher used to be at the headquarters of the lumbermen in Oshkosh a great deal, at the Hay Hardware Store. Testimony of Moses Hooper. Transcript 158-162.

The case of Beecher vs. Wetherby was well known among the lumbermen of Oshkosh and vicinity. They supposed that case settled the title in the State at the time.

After that decision, Mr. Sherry dealt in these School Lands, quite extensively relying upon the decision in that case. He purchased School Lands and later sold them through his assignee, Mr. Cameron, to Hollister, Amos & Company for \$23,000.00. This was in 1899-1900. Testimony of Henry Sherry. Transcript 162-168.

The deeds of the Sherry land to Hollister and of other lands to Hollister in 1899 will be found in the record. Transcript 167-169.

Hayter, who purchased School Section lands in the Menominee Reservation from the State about 1885, had heard that the Supreme Court of the United States had decided a case arising on the Stockbridge Reservation, and it was reported to him that the State held the land, and he relied upon that understanding when he purchased. Hayter's Testimony. Transcript 100.

Mr. Humphrey had contracted for the purchase of lands in the eighties, but did not receive a patent until 1901, and testified he was in Milwaukee attending the suit of Sherry vs. Gould, hereinafter referred to, and on the decision of the court in that case, following Beecher vs. Wetherby, he completed his payments and got the State patent. Humphrey's Testimony. Transcript 103-104.

Mr. M. J. Wallrich, the owner of school lands in the Menominee Reservation, relied largely upon Beecher vs. Wetherby, and

also upon the Government's negotiations with other owners to have the Indians cut the timber and admitting the ownership by those claiming under the State of the title to the timber, and also relied upon information obtained from the Indian Agent that there was no question but what the State owned the title to the sixteenth sections, but that the occupancy remained in the Indians. Testimony of Wallrich. Transcript 90-92.

Dewey H. George was Indian Agent of the Menominee Indian Reservation from October, 1897, to October 1, 1902. Transcript 74.

He was instructed not to meddle with any timber on the sixteenth sections. Not to remove any timber from them under the Government logging. The title of the State was unquestioned in the timber. That is, the title of parties holding from the State. The department claimed the Indians had a right of occupancy. The agent talked with various people with reference to the right of the State and its grantees in the timber on the Reservation, and he informed those who inquired what the attitude of the department was.

It was the common understanding that the timber was supposed to be owned by the parties holding the title from the State. George's Testimony. Transcript 82-83.

THE DECISION IN BEECHER VS. WETHERBY WAS FOLLOWED IN AND CONTROLLED LOCAL LITIGATION OVER SCHOOL SECTION TIMBER.

Prior to 1890, one James P. Gould bought timber on Sections 16, Township 30, Range 16 East, of Government representatives.

One Sherry claimed to be the owner in fee under conveyance from the State of Wisconsin and replevined the logs from Gould in an action commenced in the Circuit Court of Oconto County and transferred to and tried in the United States Court for the Eastern District of Wisconsin.

The Government, through W. A. Walker, its attorney, defended and claimed that the land was in the Menominee Indian

Reservation and that all of said timber was cut under authority of the United States and its officers. The trial court, following the rule in *Beecher vs. Wetherby*, held that the timber when cut belonged to the owner of the fee and grantee of the State, and judgment was rendered in Sherry's favor.

The judgment was later paid by the United States Government. Complainant's Exhibit 53 in record and statement in relation thereto. Transcript 63. Testimony of Moses Hooper. Transcript 160-161. Testimony of Henry Sherry. Transcript 162-163.

In 1897-98, the Government, through the Indians, cut a large amount of timber on the swamp lands in the Menominee Reservation and sold the same to Perley Lowe & Company for \$13.60 per thousand feet. Perley Lowe & Company thereafter sold the logs to Seymour W. Hollister of Oshkosh, the said sale and transfer being confirmed by the Secretary of the Interior. Transcript 215.

On April 30, 1898, authorities of the State of Wisconsin attached or seized the whole amount of logs so cut. Transcript 217.

Ultimately the United State Government recognized the title of the State and its grantees to the timber so cut and the matter was settled up, and Perley Lowe & Company authorized to pay the stumpage value, amounting to \$9,548.10, to the State of Wisconsin out of the purchase price withheld by them during the pendency of the litigation. Transcript 211-212. This was applying the rule in *Beecher vs. Wetherby* as to school section timber to the swamp land timber in the same Reservation.

It was after this recognition of the title to the fee being in the State that Seymour W. Hollister, the same person who bought the logs of Perley Lowe & Company, bought School Section lands as shown by the deeds to him in 1899. Transcript 167-169.

THE RULE OF BEECHER VS. WETHERBY WAS FOLLOWED AND ADOPTED AS A BASIS OF CONTRACTS RESPECTING THESE LANDS AND THE TIMBER THEREON BY THE UNITED STATES GOVERNMENT AND THE PURCHASERS OF THE STATE'S TITLE AND THE INDIANS.

On November 5, 1898, the Oconto Company, claiming certain land in Sections 16, Township 30, North of Range 16 East, under title from the State of Wisconsin, entered into a contract with the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior. Transcript 145-147.

The contract acknowledged that the Oconto Company *was the owner in fee of the land*, set forth the Petition of the Menominee Indians for permission to cut the timber, and the agreement further provided that the Oconto Company should pay the Government, for the benefit of the Indians, \$4.25 per thousand feet for cutting, hauling, removing, banking and delivering the timber. The timber itself being recognized to be the property of the Oconto Company, and the Oconto Company agreeing, that after it had received the logs and timber cut from the lands, it would transfer its right, title and interest in and to the lands, to the Government.

On the 14th day of February, 1900, a similar contract was entered into between Hollister, Amos & Company, the owners of lands in Section 16, Township 30, North of Range 16 East, held by them under grant of State title, which contract was *with the Commissioner of Indian Affairs and approved by the Secretary of the Interior*, and recites that Hollister, Amos & Company *was the owner in fee of the lands*, and the contract provided for the payment to the Commissioner of Indian Affairs of the sum of \$5.50 per thousand feet for cutting, hauling, removing, banking and delivery of the timber and logs, and likewise provided, that upon the delivery to the owners of the land of the logs and timber cut therefrom, that they would give a deed to the Government of all their rights, title and interest in and to the lands. Transcript 148-149.

This contract covered the cutting of some 1,410,000 feet of timber. Transcript 149.

Similar contracts were also made with one W. T. Zachow for the cutting of his timber on Section 16 of the same town and range. Transcript 80.

These contracts were all carried out. Transcript 78-81.

THE RULING IN BEECHER VS. WETHERBY, THAT THE STATE OWNED AND COULD THEREFORE GRANT THE FEE, HAS BEEN ACTED UPON BY THE GOVERNMENTAL TAXING SUBDIVISIONS, AND THE GRANTEES OF THE STATE HAVE PAID TAXES ON THESE LANDS FOR YEARS.

Mr. Weber examined the County Treasurer's books of Shawano County to ascertain whether taxes had been collected by both state, county and towns upon the Sections 16 in Shawano County within the Menominee Reservation as far back as 1885, and found that nearly all of them had been assessed and taxes collected each year, excepting in the case of a few forties in Section 16-30-15 and the parts that still belong to the State of Wisconsin. Weber's Testimony. Transcript, pages 119-120.

For example, Humphrey and Hayter have been paying taxes since 1885 on their lands. Humphrey's Testimony, Transcript, page 96.

Exhibits 7 to 34 in the records (mentioned in the transcript on page 62) are tax receipts of taxes paid by Humphrey and Hayter to the Treasurer of the Town of Richmond on Section 16-29-14, covering a period from 1887 to 1912, the time of the commencement of this action.

Mr. Wallrich has paid taxes on his lands in Section 16-29-13 ever since his deed. Transcript 92. This included the state, county, town taxes and road taxes.

Mr. Sherry during the time he dealt in Section 16 lands in the Menominee Reservation paid taxes on it to the state and county. Transcript, page 163.

HOSTILE CLAIMS AND ACTS OF THE DEPARTMENT OF THE INTERIOR MADE NECESSARY THE FILING OF THIS BILL AND JUSTIFY THE GRANTING OF THE INJUNCTION PRAYED FOR.

In fact, the Department started camps on Sections 16 and prepared to cut to compel the State's grantees to go into court to stop such cutting. Transcript 109.

The Department shortly prior to the filing of the present bill departed from the theory of their prior rulings, and took the position that the Government had full right, both to the lands and timber upon the Sections 16, and that they would recognize no right of the grantees of the State, and entered and commenced cutting timber. Transcript 108.

The Department built a set of camps upon Sections 16, Town 29-14, in 1912, and cut off of that Section 159,900 feet, principally hemlock, white pine, berch, soft elm, maple, basswood and cedar.

Part of the white pine was sold to one Kemnitz, who loaded it on cars and shipped it out of Neopit. The Government received \$55.00 to \$65.00 per M. for it.

The other timber cut was drawn to the mill at Neopit and manufactured into lumber and sold in the market, the same as the rest.

When they built the logging camps upon this section, they contemplated logging the section the same as other sections, and using the material to supply the wants of the mill. They had the Menominee mill at Neopit, planing mills and other mills to manufacture the raw material into every conceivable kind of building material.

No clearing followed the cutting done on this Section 16.

In fact, in all the cuttings done under the supervision of the department on the reservation, they have discouraged agriculture upon the cut-over lands. Transcript, pages 106-107.

There were other cuttings by the department on the school sections. Transcript 177.

After the commencement of the cutting by the department on Sections 16, an arrangement was made between the Indian office, the Indian agent and Mr. Eberlein, representing grantees

of the State, that the department would do no further cutting in view of the fact that the State would be called upon to institute proper proceedings to determine the ownership. Transcript 108.

There is a great deal of timber on the Menominee Reservation, and there had been considerable cutting on parts other than school sections, prior to the Act of 1908.

For instance, it appears that between 1890-'91, and 1897-'98, about 143,000,000 feet of pine timber had been cut. Transcript, page 303.

After the passage of the Act of March 28th, 1908, (chapter 111), the department in 1908 and 1909 built mills at Neopit on the Menominee Reservation, and the present Indian Agent, A. S. Nicholson, was put in charge in October, 1910.

There has been cut upon the Reservation and sawed at that mill since then an average of 20,000,000 to 25,000,000 feet yearly.

The logs were cut and transported to the mill and sawed, and the lumber and other building material sold in the public market. Transcript 105.

There is now left on the Menominee Reservation one and one-half billion feet of timber outside of the school sections.

Nicholson's testimony, Transcript 109.

At only \$7.00 per M. stumpage, this would be worth \$105,000,000—at present prices it would be worth a great deal more than that.

This timber that is left at \$7.00 per thousand feet would give each of the 1,760 Menominee Indians \$59,659.09 per person, or a fund of nearly \$240,000.00 for each family of four persons.

In addition, the Menominees would have approximately (31 sections in each of the ten townships) 198,400 acres of land, and their present tribal funds.

The present number of Menominees was given us by Mr. Nicholson. The number in 1851 was about 2,000. Transcript 273.

Agriculture upon these lands has been pretty scarce. Transcript, page 106.

In fact, in all the cuttings they have done on the Reservation, they have discouraged agriculture upon the cut-over lands. Transcript 107.

The pine timber on Sections 16, ³⁰ 15 is all green pine timber, principally live pine timber, as good a quality as anywhere on the Reservation. Nicholson's testimony. Transcript 114.

On Section 16-29-14 there is good, thrifty green timber. Hayter's testimony. Transcript 101.

In the cutting done by the Department, both on Section 16, Town 29, Range 14 East, and on lands to the North and South of this section, the timber was cut clean, and as an ordinary logger would cut it, taking off all the merchantable timber. If anything, it was cut a little cleaner than most loggers would cut. Testimony of Len Dodge, Transcript, page 125; testimony of Silas Pendleton, Transcript, page 130-131; testimony of Charles Tourtelot, Transcript, page 131.

ACTS OF CONGRESS GIVING INDIANS U. S. INTEREST IN TIMBER.

The U. S. Government, holding the legal title to the entire Menominee Reservation, except the State lands therein, by Chapter 418, being the Act of June 12th, 1890, 26 U. S. Statutes at Large, 146, gave to the Indians its interest in the standing timber, and provided for the cutting and sale of the timber, and the placing of the moneys derived from the sale of the timber to the credit of the different funds of the Menominee Indians.

This relinquishment by the United States of its interest in the standing timber did not, and could not, affect the interest of the State of Wisconsin and its grantees in the State sections.

This was clearly understood and held by the Departments in their construction of that act, and it was clearly declared that "the effect of this act was merely a relinquishment by the United States of this reversionary interest in the timber upon that part of the Reservation to which the United States held the fee sim-

ple title, it was not the purpose of Congress by that Act to give away to the Indians the timber upon the sixteenth sections, which would become the absolute property of the State on its being wrongfully severed from the soil.

You are therefore instructed that it would be a trespass against the State to permit the Indians to cut timber on the sixteenth sections within their Reservation." Transcript 171.

Subsequently Congress determined that instead of cutting the timber and selling the logs that it would be better to authorize the Secretary of the Interior to manufacture the logs into lumber and for that purpose to build and operate saw mills for manufacturing the logs into lumber on the Reservation, employing the Indians so far as practicable in the operations and provided that the lumber, lath, shingles, poles, posts and pulp wood and other marketable materials so manufactured should be sold to the highest and best bidder for cash, and the proceeds deposited to the credit of the Menominee tribe. Act of March 28th, 1908, entitled, "An Act to Authorize the Cutting of Timber, the Manufacture and Sale of Lumber, and the Preservation of the Forest on the Menominee Indian Reservation in the State of Wisconsin."

This Act manifestly had the same effect as the Act of June 12th, 1890, and should be construed, as that Act was as merely a relinquishment by the United States of its reversionary interest in the timber upon that part of the Reservation to which the United States held the fee simple title, and it was not the purpose of Congress to, and it could not by any Act, give away to the Indians the timber upon the sixteenth sections of which the State of Wisconsin, and its grantees, held the fee.

This Act of March 28th, 1908, is the one under which the Indian agent and the Department claimed authority for the cutting on the school sections involved here.

There has, however, been no relinquishment on the part of the State, or its grantees, of their interest in the timber, and under the former rulings of the Department and the plain interpretation of the law, only the United States has relinquished its interest, and that interest was only the remainder in the lands other than the school sections.

REFORESTATION.

Some claim is made by the Indian Agent, that though they cut the timber on the Reservation now, in perhaps 700 years in the case of pine, and from 150 to 250 years in case of the hemlock, there may be a new and matured growth of timber, and that, therefore, though they make no claim that they are now cutting timber to prepare the land for agriculture, nevertheless, the owners should not now have the timber or its value because in periods of time, many times greater than the age of this nation, there may possibly be another growth.

Nicholson's testimony, Transcript 110-115.

The fact is, however, that the consent of the United States to such cutting has alone been given. That was by the acts of June 12th, 1890, and March 28th, 1908. Without these acts the Indians could not have cut off the timber.

The State and its grantees have never consented to any cutting on the school sections.

In the foregoing review of the facts disclosed by the evidence, we have at times indicated our theories as to the law, and as to the legal effect of certain facts.

We hope that this may, to some extent, lighten the labor of the Court.

ARGUMENT.

We believe that all the evidence in the case conclusively establishes the following facts:

1. That by the Treaty of 1848, the Menominees for value ceded to the United States *all their lands* in Wisconsin.
2. That *any and all right to remain on said lands* under the provision of the Treaty of 1848, and the President's subsequent extensions of time *expired on October first, 1852*.
3. That the subsequent stay of the Menominees on the lands to which they were removed in the Fall of 1852 was *a temporary provision* under the Act of Congress of

August 30th, 1852. Temporary as distinguished from permanent; and probably contemplating a stay for such few years as might enable the United States Government to make some other arrangement for a permanent home before the White settlements should reach the territory or the State desire to use its lands therein.

4. That the lands at the head-waters of the Wolf and Oconto to which the Menominees were temporarily removed in 1852 were not lands which they had occupied or were entitled to occupy at the time of the Treaty of 1848, with the exception of a very small part.

That is, the lands to which they temporarily removed in 1852 were in Ranges 15, 16, 17, 18 and 19, Towns 28, 29 and 30.

All of Ranges 17, 18 and 19 and the major part of 16 were in lands ceded to the United States Government in 1836, and then surveyed, and only Range 15 and the smaller part of 16 were within the limits of the territory which the Menominees claimed at the time of the Treaty of 1848.

5. The lands to which the Menominees moved temporarily in 1852 were not the same lands as those provided for the Reservation by the Treaty of 1854. The Treaty did not take in Ranges 17, 18 and 19 and added Ranges 13 and 14. This will all appear plainly from Map 1, Exhibit 68, in the Record, and also printed in Brief for Defendant on the Motion to dismiss the Bill.

6. The so-called "consent" by joint Resolution of the Legislature of Wisconsin, (transcript 244), was only to the remaining of the Indians on the land to which they were temporarily removed in 1852, and which was not the same land as that of the present Reservation, and was intended for a temporary stay only.

7. Before the present Reservation was created by the Treaty of August 2nd, 1854, the Indians had lost all occupancy of their former lands which were held "as Indian

lands are held," and *were remaining temporarily* in Ranges 15, 16, 17, 18 and 19, Townships 28, 29 and 30 only as *Licensees* or *at sufferance* until some permanent arrangement should be made.

That is, all occupancy by the Indians under a claim of title *had ceased* by their cession, and they no longer remained on the ceded lands (except that a few Townships in the Western part of their temporary location were included in their old lands), and *they were not in these temporary quarters by virtue of any claim of title on their part*, but merely *by sufferance by the United States and the State of Wisconsin*.

So that at the time of the creation of their Reservation, August 2nd, 1854, they retained and had no claim of title "as other lands are held," or otherwise, but *were merely in a temporary location by sufferance*.

There can, therefore, be no tacking of ancient claims to the "new Reservation" set apart by the Treaty of August 2nd, 1854.

8. *Prior to the Treaty* creating the new Reservation of August 2nd, 1854, *the public survey had been completed and approved* as far as Sections 16, in Township 30, N. R. 15 E; Town 28 N. R. 16 E; Town 29, N. R. 16 E, and Town 30 N. R. 16 E.

In Town 29 N. R. 13 E; Town 29 N. R. 14 E, *the public surveys had been completed and the subdivisions made*, though the approvals thereof were not until October 11th, 1854.

In Town 30 N. R. 13 E.; and Town 30 N. R. 14 E, *the outer boundaries had been surveyed* in 1851 and the subdivisions were completed in November, 1854. and approved February 6th, 1855.

In Town 28 N. R. 15 E., and Town 29 N. R. 15 E, *the original boundaries were completed before the Treaty of 1854*, but the subdivisions were not completed until

May and July, 1891, and the surveys were approved on August 28th, 1891, and October 3rd, 1891.

9. Prior to the Act of June 12th, 1890, authorizing the cutting of timber, *all of the surveys had been completed and been approved*, except in the two Townships, 28 N. R. 15 E and 29 N. R. 15 E, and these were completed and approved in 1891, and *long prior to the Act of March 28th, 1908*, under which the Defendants are claiming the right to cut and manufacture and sell the timber on the Sections 16 in the Reservation.

10. The two school sections involved in Beecher vs. Wetherby *were a part of the lands included in the Menominee Reservation* by the Treaty of August 2nd, 1854, and were subsequently, with the consent of the Menominees, set over to the Stockbridge Indians by the Treaty of February 5th, 1852, proclaimed and in force October 8th, 1856.

Indian affairs, laws and treaties, Vol. 2, 556.

11. Under the Treaty with the Menominees in force August 2nd, 1854, the lands in the Menominee Reservation were given to them "*to be held as Indian lands are held*" only. Transcript, top page 20.

Under the subsequent Treaty with the Stockbridge Indians, above referred to, the Stockbridge Indians were given *greater rights* in their two Townships, it being the intent of that Treaty to provide for the final allotment of the land to the Indians in severalty.

The two Townships given to the Stockbridge Indians by the Treaty of 1856 were in Township 28, North Ranges 13 and 14 East.

The Department, since the advent of the new Indian Agent in 1910, and since the erection of the lumber manufacturing plants by the Department on the Menominee Reservation *has claimed the entire fee in the School Sections*, and *has threatened to cut and log the timber thereon*, and to manufacture it into lumber at its mills, and *sell it*

commercially to the public, and has already cut considerable timber for that purpose on different Sections 16, and has invited the bringing of this suit to determine the rights of the respective claimants.

12. The State of Wisconsin has granted most of these lands through sales and patents dating back, many of them, to the 50's, and the State of Wisconsin and its grantees have always claimed these Sections 16, and they have been sold, taxed and transferred as property by the State and its Grantees, and the Government by the rulings of its Departments, and by contracts made with the State's Grantees has repeatedly acknowledged the ownership of the fee in the State and its Grantees subject to the occupancy of the Indians.

13. In case of the failure of the State of Wisconsin to furnish complete title to lands sold by it, it is by law compelled to return the amount paid, together with interest, and is therefore *interested in, and a proper party to protect* the title of its Grantees as well as its own.

Sections 230 and 232, Wisconsin Statutes, 1915, page 175, printed in Transcript page 187.

I.

All of Section 16 having been surveyed and the surveys approved (except in T. 28 N. R. 15 E. and T. 29 N. R. 15 E.) prior to the Acts of June 12th, 1890, and all of the Sections 16 in the Reservation having been surveyed and the surveys approved prior to the Act of March 28th, 1908, the School Sections had been identified, and the title of the State of Wisconsin had vested, and it has acquired the fee to such School Sections and any relinquishment by the United States by either of said Acts could not relinquish or extinguish the interest of the State in the School Sections; and its title thereto was not, and could not be in any way affected by said acts under all the authorities.

By the survey and the approval thereof, the grant of the School Sections was identified and the title thereto passed to the State of Wisconsin, and assuming for the purpose of argument

that its title was subject to occupancy by the Indians under the Menominee Treaty effective August 2nd, 1854, the State nevertheless, under all the authorities, from the time of the approval of the surveys, held the title in fee, and therefore no subsequent act of the Government could lessen or defeat the title of the State and its grantees.

The only claim of interest in the lands that the Indians then had was to hold these lands "as Indian lands are held," and all the authorities, we believe, are in harmony to the effect that in such case, the title of the State vested in fee on the making and approval of the public surveys of such land.

Beecher vs. Wetherby, 95 U. S. 517.

Minn. vs. Hitchcock, 185 U. S. 373.

Cooper vs. Roberts, 188 Howard, 173.

United States vs. Thomas, 151 U. S. 577.

Wisconsin vs. Hitchcock, 201 U. S. 202.

Heydenfeldt vs. Daney Gold & S. M. Co., 93 U. S. 634.

United States vs. Morrison, 240 U. S. 192.

All of these cases are in harmony and agree with the propositions that the grants to the State of School Sections were intended to cover all public lands of the United States, including those in the occupancy of the Indian tribes where the Indian right was only of "occupancy," or as it is usually put, "as other Indian lands are held"; and excepting lands previously "sold or otherwise disposed of"; and that upon the identification of the School Sections by public survey and its approval, the title to the fee vests in the State subject only to the Indian right of occupancy, and that from the time of the identification of such sections and the vesting of the title of the fee thereto in the States, no further disposition can be made thereof by the United States which would lessen or affect the interest of the State.

In *Beecher vs. Wetherby*, this Court, as we understand it, definitely held that the grant of the School Sections to the State of Wisconsin carry the Sections of public lands which were held by the Indians by right of "occupancy;" in other words, that such mere right of "occupancy," or holding, "as other Indian lands are held," was not within the meaning of the grant "a sale

or other disposition" thereof, and this rule has consistently and repeatedly been followed by this Court in the cases above cited.

In *Beecher vs. Wetherby*, the Court was dealing with the Sections 16 in two of the Townships included in the Menominee Reservation by the Treaty of August 2nd, 1854, and which Sections were subject to the same Indian "occupancy" as the other School Sections in the Reservation at the time of the surveys thereof, and which two Sections 16 were in two Townships, which after the public surveys and the approval thereof, were given by the Treaty of February 5th, 1856, to the Stockbridge and Munsee Indians, with the idea of giving such Indians the fee ultimately, but which Sections were afterwards sold under the Act of Congress of February 6th, 1871, for the benefit of the Stockbridge and Munsee Indians.

Manifestly, both by the Treaty with the Stockbridge and Munsee Indians of 1856, and by the Act of Congress of 1871, authorizing the sale of the lands—if the Treaty or the Act be held to apply to the School Sections—there was an encroachment upon, or a lessening of the interest in remainder, or the fee title of the State of Wisconsin, and its Grantees, and this Court plainly said in *Beecher vs. Wetherby* that the Act of Congress of February 6th, 1871, authorizing a sale of the Townships occupied by the Stockbridge and Munsee tribes.

"must therefore be held to apply only to those portions which were outside of Sections 16.

It will not be supposed that Congress intended to authorize a sale of land which it had previously disposed of. The appropriation of the Sections to the State, as already stated, set them apart from the mass of public property which could be subjected to sale by its direction."

It therefore follows, that the Act of June 12th, 1890, 26 U. S. Statutes at Large, 146, relinquishing to the Indians the timber on the Reservation with the right to cut and market the same, could not relinquish the timber on the School Sections; nor in any way impair the rights of the State of Wisconsin, and its Grantees therein.

The Act of June 12th, 1890, authorizing the cutting and sale of the timber in the Townships in the Menominee Reservation must therefore—in the language of this Court, with relation to the Act of February 6th, 1871, for the sale of the Stockbridge Townships, “be held to apply only to those portions which were outside of Section 16”, and “it will not be supposed that Congress intended to authorize a sale of ‘timber’ which had previously been disposed” of to the State of Wisconsin, and which the State of Wisconsin holds and owns as owner of the fee, subject certainly, to nothing more than the mere Indian “occupancy.”

That this was the proper construction of the Act of June 12th, 1890, was recognized by the office of Indian Affairs and the Department of the Interior, when Acting Commissioner, Towner, in his instructions of November 12th, 1897, to the Indian Agent of the Menominee Reservation said:

“By Acts of Congress, the State of Wisconsin had previously to the final setting apart of this Reservation been granted the 16th Sections, this was subject to the Indian right of occupancy. The Indian right of occupancy does not carry with it any right to cut timber for the purposes of sale, or to open lines, except for the use of the Indians on the Reservation.

“By the Act of June 12th, 1890, (26 Chap. 146) the United States gave as a gratuity to the Menominee Indians, the right to cut and sell the timber on their Reservation. *The effect of this Act was merely a relinquishment by the United States of this reversionary interest in the timber upon that part of the Reservation to which the United States held the fee simple title; it was not the purpose of Congress by that Act to give away to the Indians the timber upon the 16th Sections, which would become the absolute property of the State on its being wrongfully severed from the soil.*

“You are therefore instructed that it would be a trespass against the State to permit the Indians to cut timber on the 16th Sections within their Reservation, except for such purposes as may be necessary to give them the full enjoyment of their occupancy right of the land.”

Similarly, under the decision in *Beecher vs. Wetherby*, and the ruling of the Department, it must be held that the Act of March 28th, 1908, (Chapter 111, page 51, part One, Statutes of the United States, First Session, Sixtieth Congress, 1907-1908), providing for the cutting and manufacturing of the dead and down timber, and the fully matured and ripened green timber on the Menominee Reservation and its sale commercially to the public, applies "only to those portions (of the Reservation) which were outside of Section 16," or in the words of this Court, in *Beecher vs. Wetherby*, "it will not be supposed that Congress intended to authorize a sale of land (timber), which it had previously disposed of. The appropriation of the Sections to the State, as already stated, set them apart from the mass of public property which could be subjected to sale by its direction."

The relinquishment of the United States of its ownership of the timber, as owner of the remainder or fee title to the land, by the Act of March 28th, 1908, the same as its similar relinquishment under the Act of June 12th, 1890, "was merely a relinquishment by the United States of this reversionary interest in the timber upon that part of the Reservation to which the United States held the fee simple title," as ruled by the Department under the Act of June 12th, 1890, Transcript 171, and as held by this Court in *Beecher vs. Wetherby* under the Act of 1871.

Prior to the Act of June 12th, 1890, the United States, as owner of the fee and remainderman of all the lands in the Reservation, except the Sections 16, owned the land and timber, and was entitled to it when cut under the decision of this Court in *United States vs. Cook*, 86 U. S. 591.

In that case this Court said:

"The land cannot be sold by the Indians and consequently the timber, until rightfully severed, cannot be. It can be rightfully severed for the purpose of improving the land or the better adapting it to convenient occupation, *but for no other purpose.*"

It was because the United States Government owned the timber as remainderman *that it was necessary for it to relinquish its interest in the timber to the Indians by the Acts of Congress of June 12th, 1890, and March 28th, 1908.*

The passage of these two acts is therefore further proof of the recognition by the Government that the timber did not belong to and could not be cut by the Indians under the Treaty without such relinquishment of the Government ownership thereof.

The United States Government could not relinquish the interests of the State of Wisconsin, or of its grantees in and to the School Sections, and therefore the Acts of Congress could not apply to the Sections 16, nor to the timber thereon, and the ownership thereof when cut for commercial sale is in the State and its grantees.

The right and interest of the United States in and to the timber on the lands in the Reservation—other than Sections 16—which the United States Government relinquished by the two Acts of Congress of 1890 and 1908, is the very same right and title which the State of Wisconsin and its grantees acquired in the Sections 16 by the making and approval of the public surveys thereof.

In other words, after the Treaty with the Menominees, effective August 2nd, 1854, the United States still held title to the lands, (outside of the Sections 16) subject only to the right of occupancy of the Indians, and as such owner of the fee would be entitled to the timber when cut for commercial sale.

It was this ownership of the timber which the Government relinquished or turned over to the Indians by the Acts of Congress of 1890 and 1908.

Without this relinquishment, the Indians would have no right to the timber when cut, and no right to the proceeds thereof when sold.

This same ownership that the United States Government had in and to the timber on the Reservation generally, is in the State of Wisconsin and its Grantees so far as the School Sections are concerned.

Neither the State nor its Grantees have surrendered or relinquished this ownership of the timber, nor have they given any right to the Indians to cut the same, and they therefore would

own any timber cut for commercial purposes, and be entitled to the proceeds thereof.

The fact that it was necessary for the United States Government to relinquish its title to the timber before it could be cut by the Indians, and before the proceeds thereof could be turned into the tribal funds, emphasizes our contention that without similar relinquishment by the State and its Grantees, the Indians cannot cut for sale our timber on the Sections 16.

We submit that all the cases cited above are consistent with and support our theory that the State of Wisconsin and its Grantees by the public surveys and the approval thereof, prior to the Acts of 1890 and 1908, acquired the title to the School Sections in the Reservation subject at most to the bare right of occupancy of the Indians.

In the *United States vs. Thomas*, the question was whether the Sections 16 in the Chippewa Indian Reservation were within the limits of the Reservation, within the meaning of the criminal statutes, and the Court held that they were.

In that case the Court cited and approved of the decision in *Beecher vs. Wetherby*, and held on the facts in that case that the title as to Section 16 vested in the state, subject to the right of occupancy of the Indians.

The facts in that case are in many ways different from those in the case at bar and from those in the case of *Beecher vs. Wetherby*. At the date of the Treaty before the Court in the *Thomas* case, no survey of the lands had been made, so that within the rule in *Cooper vs. Roberts*, the state's rights had not vested absolutely, but rested compact. Again in that case, the prior cession by the Chippewas under the Treaty of October 4, 1842, reserved to the Indians the privilege of occupancy until required to remove by the President, and he had not ordered such removal.

In our case the President had terminated the temporary rights of occupancy of the lands ceded to the Menominees under the Treaty of 1848 and their last vestage of right to remain thereon had expired on October 1, 1852, the date of the expiration of the last extension made by the President.

Again in the Chippewa case, the Indians were still occupying the lands ceded by the Treaty of 1842 at the time of the new Treaty.

In our case, the Indians had been removed from their former homes on the land ceded by the Treaty of 1848 and at the time of the Treaty of 1854, were temporarily located at the headwaters of the Wolf and Oconto Rivers, on land, the greater part of which had been ceded to the United States by the Treaty of 1836, and of which lands they were then only licensees or occupants by sufferance.

In *Minnesota vs. Hitchcock*, 185 U. S. 373, by Act of Congress of January 14, 1889, provision was made for the sale of the lands in the White Earth and Red Lake Indian Reservations in Minnesota, the funds to be held in trust for the Indians, which was held to create a *trust* in the lands to be executed by the sale thereof, and the deposit of the proceeds in the Treasury of the United States. It appeared in that case—differing from *Beecher vs. Wetherby*, and from the case at bar—that the lands had not then been surveyed, and consequently this court held that because of the establishment of this *trust*—prior to the public surveys—that there had been a sale, or in other words, the lands had been “otherwise disposed of” before the State’s title to the school sections became complete by the public surveys. The right of the State of Minnesota in and to the school sections because of there being no survey, had not vested at the time of the act of 1889 or at the time of the approval thereof by the President.

This Court in its opinion in *Minnesota vs. Hitchcock* referred to and approved *Beecher vs. Wetherby*, and on page 397, carefully noted the main distinguishing features.

Wisconsin vs. Hitchcock, 201 U. S. 202, was a suit brought with reference to the Chippewa Reservation lands in Wisconsin, and the decision follows largely the *Thomas* case.

The facts with reference to the Reservation there considered being practically similar to those in the *Thomas* case. It will therefore be noted that all the facts which distinguish the *Thomas* case from the case of *Beecher vs. Wetherby*, and from the present case, also distinguish *Wisconsin vs. Hitchcock* from *Beecher vs. Wetherby* and from the case at bar.

In the case of *Wisconsin vs. Hitchcock*, the State's rights to the School Sections rested in compact at the time the Chippewa Treaty of September 30th, 1854, was made. That is, the lands had never been surveyed nor the Sections 16 identified.

In both, *Wisconsin vs. Hitchcock* and in the *Thomas* case there was also a very great difference between the Treaties involved and the Treaty with the Menominees considered in *Beecher vs. Wetherby*, and in the case at bar.

That is, the Indian Treaties in *Wisconsin vs. Hitchcock* and in the *Thomas* case provided for ultimate allotments and also bound the United States to withhold from sale the lands described in the Treaties, while in the Treaty of 1854, creating the Menominee Reservation, the only provision was for Indian "occupancy," the Treaty providing that the lands were to be held "as other Indian lands are held."

In fact, the Chippewa Treaty may be said to have created something of a trust, and in that sense may have been a disposal of the lands, as was held in *Minn. vs. Hitchcock*, while in *Beecher vs. Wetherby* and in the case at bar we are dealing with a Treaty which only gave, at most, rights of occupancy and the fee, subject to such right of occupancy, remained in the United States Government as to all of the Reservation, except the School Sections, and as to those, it vested in the State on the making and approval of the public surveys.

It may also be said that in both the *Thomas* case and *Wisconsin vs. Hitchcock*, there had been no termination by the President of the earlier occupancy under the Treaty of March 23rd, 1843, while in the case of the Menominees there was a termination of all their rights under the Treaty of 1848 by the expiration of the last extension made by the President on October 1st, 1852, two years before the Treaty under which the present Reservation was established on August 2nd, 1854.

In *Heydenfeldt vs. Daney Gold & S. M. Co.*, 93 U. S. 634, the lands had been entered upon for mining purposes, and were claimed and occupied in accordance with mining laws, and the custom of miners prior to the public surveys and the mining rights acquired by such entry were protected by the Act of Con-

gress of July 26th, 1866, which as this Court in its opinion said, "was passed *before the land in controversy was surveyed*," and this Court therefore held, that such lands were "otherwise disposed of," within the meaning of the grant, before the State title became effective through the public surveys.

In *United States vs. Morrison* it was held that the State of Oregon did not, under the Act of February 14th, 1859, c. 3311 Stat. 383, take title to Sections 16 and 36 prior to the survey, and that until such Sections were defined by survey, and title vested in the State, Congress had power to dispose of them on compensating the State for the resulting deficiency.

The land in this case was surveyed and the survey accepted "for payment only on January 31st, 1906."

On December 16th, 1905, the Secretary of the Interior had "temporarily withdrawn for forestry purposes from all forms of disposition whatsoever," all vacant and unappropriated public lands, which included the land in controversy. On January 25th, 1907, the President issued a proclamation enlarging the Cascade Range Forest Reserve so as to include the 16th Section in question, with other lands.

On November 16th, 1907, the plat which was only conditionally approved in 1906, was finally approved and placed on file.

The Court cited with approval the rule laid down in *Heydenfeldt vs. Daney-Gold & S. Min. Co.*, that until the status of lands was fixed by a survey, and they were capable of identification, Congress had absolute power over them.

Further, that the conditional approval of the Survey in 1906 was not a completion of the survey within the regulations of the Interior Department, and that before such survey was finally completed in November, 1907, the land in question had been "otherwise disposed of" before it had been appropriately identified by survey and title vested in the State under the Act which admitted the State of Oregon to the Union.

In the Morrison case, this Court considered and referred to Beecher vs. Wetherby and particularly pointed out that there;

"the land had been occupied by the Menominee Indians, but *their right was only that of occupancy*. The fee was in the United States subject to that right, and could be transferred by them whenever they chose."

They further say with reference to Beecher vs. Wetherby that "the Court held that the title had vested in the State."

They further said of the situation in Beecher vs. Wetherby that

"the lands had been surveyed in 1854; prior to that time there had been no other disposition of the fee by the United States; *the title had vested in the State, subject at most to the Indian occupancy, and this had terminated.*

II.

The right of the State and its Grantees to the fee in the school sections in the Menominee Reservation is established by the decision of this Court in Beecher vs. Wetherby, and the rule laid down has become a rule of property for Sections 16 in that Reservation and has as such been accepted and relied upon by all parties in dealing with those lands.

The right and title of the State of Wisconsin in and to the 16th sections of this particular reservation were determined and established by this Court in Beecher vs. Wetherby.

That decision settled the law on that proposition for this reservation for all time.

This court there held "That Congress intended to vest in the State the fee to section 16 in every township."

On this point the court further said, "The greater part of the State was, at the date of the compact, occupied by different tribes, and the granting of sections in other portions would have been comparatively of little value. Congress undoubtedly expected that at no distant day the State would be settled by white people, and the semi-barbarous conditions of the Indian tribes would give place to the higher civilization of our race."

"But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee and could not disturb the occupancy of the Indians." Again, "The right of the United States to dispose of the fee of lands occupied by them (the Indians) has always been recognized by this court from the foundation of the government;" and again, quoting from *Johnson vs. McIntosh*, 8 Wheaton, 543: "The possession, when abandoned by the Indians, attaches itself to the fee without further grant." The court also laid down with reference to these particular sections 16 the propositions that whether the enabling act and the act of admission created a grant in praesenti or in future, that "in either case the lands which might be embraced within those sections were appropriated to the State," and again, that "They could not be diverted from their appropriation to the state."

This court also, following the decision in *Cooper vs. Roberts*, 18 Howard 173, laid particular stress upon the fact of a survey having been made, and said: "But when the political authorities have performed this duty (surveyed out the land), the compact has an object upon which it can attach, and if there is no legal impediment, the title of the State becomes a legal title. The *jus ad rem* by the performance of that executive act becomes a *jus in re*, judicial in its nature and under the cognizance and protection of the judicial authorities as well as others."

The decision of this court that the State of Wisconsin had acquired the absolute fee to the sixteenth sections in the Menominee Reservation became and has ever since been a rule of property for all concerned therein.

The state has patented lands in said sections, for value, to its citizens, relying upon that decision.

The grantees of the state in turn have sold for large considerations, different parts of these lands, so patented to them. In fact, it may be said to have been well understood, not only by the state and its grantees, and their grantees, but by the Indians and the government departments as well, that the decision in *Beecher vs. Wetherby* had established for all time the state's right to these sections sixteen.

The departments of the government in their rulings, and their legal advisers in their opinions, recognized the state's right in and to these sections under that decision.

The ownership of the state and its grantees has been recognized by solemn recitals in agreements with the Indian Department, approved by the Secretary of the Interior, concerning timber cut on these school sections.

The state, the counties and the towns have taxed the grantees of the state because of their ownership of the fee since the time the state patented the lands to the purchasers from it.

The decision of *Beecher vs. Wetherby*, establishing the ownership of the fee in the state and its grantees has been followed in local litigations in the Federal Trial courts and in the state courts.

The department has on many occasions allowed the owners of the fee to remove their timber, usually to be sure, endeavoring to secure the Indians the job of cutting it.

In fact, the government paid on different occasions large damages for trespasses committed by the Indians upon these lands.

The decision of this court in *Beecher vs. Wetherby*, recognizing the State's ownership of these sections, has stood as *a rule of property* with relation to this Reservation for forty years.

Lands have been sold and bought in reliance upon it, and to change that rule now would cause hundreds of thousands of dollars of loss to parties who have acted upon the faith of that decision.

III.

The State of Wisconsin has never consented to the Treaty of 1854 with the Menominee Indians, and never assented to any occupancy by the Indians under that Treaty, nor waived its rights to the Sections 16.

The assent attempted to be given by the joint resolution of February first, 1853, Transcript 244, was to the temporary occu-

pancy by the Menominees of different lands at the head waters of the Wolf and Oconto.

This was expressly decided in *Beecher vs. Wetherby*, where the same question was involved, and this Court plainly held that the State's assent was to the temporary occupation and not to the Treaty, saying,

"It is true that subsequently the Indians, being unwilling to leave the State, the President permitted their *temporary occupation* of lands upon Wolf and Oconto Rivers, and in 1853 the State gave its assent to the occupation."

Defendant's counsel, in their brief, on motion to dismiss the bill, page 18, refer to the resolution of the legislature of Wisconsin, of February 1st, 1853, as an assent on the part of the state to the creation of the Reservation.

This is most clearly erroneous.

At the time the legislature passed the resolution of February 1st, 1853, the Menominee Indians—pending their removal to the west, under the provisions of the treaty of 1848—were permitted to remove temporarily to lands in and adjacent to the present reservation.

Under the treaty of 1848, Article '8, Bill of Complaint, page 22, the Indians were permitted to remain temporarily on the lands ceded, and this permission was from time to time extended by the President. Bill of Complaint, Exhibits I and J. Later, in 1852, they were removed to the Wolf and Oconto.

The Resolution of the Legislature of Wisconsin of February 1st, 1853, particularly refers to the "lands set apart for them by the President of the United States," and describes the land (showing that even at that time the public surveys had been largely made) as "commencing at the Southeast corner of Town 28, North, Range 19, running thence West thirty miles, thence North eighteen miles, thence East thirty miles, thence South eighteen miles, to the place of beginning." Thus taking in, fifteen townships of land—the present Reservation contains twelve—and nine of the fifteen Townships being Easterly of the pres-

ent Reservation, and only six of the Townships mentioned in the Resolution of the Legislature being within the limits of the present Reservation.

The Treaty creating the present Reservation was not negotiated until some 15½ months later, when the Indians and the United States Agent met, on May 12, 1854, at the Falls of the Wolf River.

We submit that this consent to the temporary removal of these Indians, if valid, can not be tortured or construed into the grant of a permanent right, and cannot by any possibility be considered as an assent to the Treaty negotiated more than fifteen months afterwards, and ratified in August, 1854.

Certainly, the State of Wisconsin had no such idea, and the acts of all the parties gave it no such construction. The State claimed ownership and conveyed away parts of said section 16 and has taxed said lands.

It is also very clear that these sections 16, being school lands, could not be disposed of nor diverted to any other use by the State Legislature. Constitution of Wisconsin, Article 10, Sections 7 and 8.

State ex rel, Sweet vs. Cunningham, 88 Wis. 81.

The constitutional provisions of Wisconsin referred to are as follows:

"Article 10—Section 7: The Secretary of the State, Treasurer and Attorney General shall constitute a board of commissioners for the sale of the school and university lands, and for the investment of the funds arising therefrom. Any two of said commissioners shall be a quorum for the transaction of all business pertaining to the duties of their office."

Section 8: "Provision shall be made by law for the sale of all school and university lands after they shall have been appraised; and when any portion of such lands shall be sold and the purchase-money shall not be paid at the time of the sale, the commissioners shall take security by mortgage upon the land sold for the sum remaining unpaid, with seven per cent. interest thereon,

payable annually at the office of the treasurer. The commissioners shall be authorized to execute a good and sufficient conveyance to all purchasers of such lands, and to discharge any mortgages taken as security, when the sum due thereon shall have been paid. The commissioners shall have power to withhold from sale any portion of such lands when they shall deem it expedient, and shall invest all moneys arising from the sale of such lands, as well as all other university and school funds, in such manner as the Legislature shall provide, and shall give such security for the faithful performance of their duties as may be required by law."

IV.

The Indians, having at most a right of occupancy, cannot rightfully sever the timber for purposes of sale.

It is established by the decisions of this court, as we understand them, that Indians on Reservations where their only right is to occupy the lands "as other Indian lands are held," have no right to cut the timber for the purposes of manufacture and sale to the public.

The United States Government has by the acts of 1890 and 1908, relinquished its right to the timber on all of the Reservations of which it holds the fee.

As to the school sections, the situation remains the same as it has been continuously since the Treaty of 1854, and the authorities are clear, we think, that the Indians cannot cut and remove the timber on the school sections for manufacture and sale commercially.

The leading case is *United States vs. Cook*, 86 U. S. 595, which established the rule that the mere right of occupancy in the Indians did not and could not give them any right to cut down and destroy the timber as against their remainderman.

It is undisputed here that under the act of 1890 and under the act of 1908, the cutting is not for the purpose of preparing the land for agriculture and is not for the purpose of making homes thereon for the Indians, but is primarily and directly with the object and purpose of manufacturing the logs cut from the tim-

ber into lumber and selling the same in the general market to the highest bidder *for the purpose of realizing the largest possible sum*, which is to go into the tribal funds of the Menominee Indians.

This court in the Cook case said, what is peculiarly applicable to this case, viz: "In this case it is not pretended that the timber from which the saw logs were made was cut for the purpose of improving the land; it was not taken from any portion of the land which was occupied, or so far as appears intended to be occupied for any purpose inconsistent with the continued presence of the timber. It was cut for sale and nothing else."

And they decided that the timber so cut became the property absolutely of the remainderman, in that case the United States.

So, here, we claim that any timber so cut, would be the absolute property of the remaindermen, or, in other words, the absolute property of the State of Wisconsin, or its grantees.

This court further said in the Cook case: "These are familiar principles in this country, and well settled, as applicable to tenants, for life and remaindermen."

And again: "*The Indians having only a right of occupancy in the lands, the presumption is against their authority to cut and sell the timber.*"

The court also say, that cutting, for commercial purposes or for any purpose other than the improvement of the land, would be waste and unauthorized. The decision in the Cook case applies with particular force to the facts here.

The cutting here is solely for commercial purposes; it is only being done for the purpose of getting money by the sale of the manufactured product. There is no intention of using the land for homes.

More than that, it is done under a claim by the defendants—of recent origin—that the Indians absolutely own the land, and have the right to cut and sell all the timber for any purposes whatsoever.

In the Cook case, this court had to settle the title to certain of the land which, in 1831, was ceded by the Menominee Indians as a home for the New York Indians. It was stipulated in the treaty that such land was to be held by the New York Indians under such terms as the Menominees held their lands. Treaty of 1831, Article One.

Some time thereafter, some of the Oneidas, a tribe of New York Indians, ceded to the United States all the land set apart for them, except a tract containing one hundred acres for each individual, in all about 65,000 acres, which they reserved to themselves to be held as other Indian lands were held. Of this tract, some 3 or 4 thousand acres were actually occupied and cultivated as farming lands by individuals of the tribe in severalty. Some of the tribe cut timber from a part of the Reservation not occupied in severalty, manufactured it into saw logs and sold it to the defendant. The United States then brought an action of replevin, to recover possession of the logs.

The court, in this case, not only disposed of the question of what the Indian's right of occupancy was, but likened it to the right of a tenant for life, and applied the general rule of law pertaining to such right, to that case.

The opinion, by Mr. Justice Waite, in part, says: "That right of the Indians in the land from which the logs were taken was that of occupation alone. They had no power of alienation, except to the United States. This is the title by which other Indians hold their lands. This right of use and occupancy by the Indians is unlimited. They may exercise it at their discretion. If the lands in a state of nature are not in a condition for profitable use, they may be made so. If desired for the purpose of agriculture, they may be cleared of their timber to such an extent as may be reasonable under the circumstances. The timber taken off by the Indians in such clearing, may be sold by them. BUT TO JUSTIFY ANY CUTTING OF THE TIMBER, EXCEPT FOR USE UPON THE PREMISES, AS TIMBER OR ITS PRODUCT, IT MUST BE DONE IN GOOD FAITH FOR THE IMPROVEMENT OF THE LAND. THE IMPROVEMENT MUST BE THE PRINCIPLE THING, AND THE CUTTING OF THAT TIMBER, THE INCIDENT ONLY.

ANY CUTTING BEYOND THIS WOULD BE WASTE, AND UNAUTHORIZED.

"The land cannot be sold by the Indians, and consequently, the timber, until rightfully severed, cannot be. It can be rightfully severed for the purpose of improving the land or the better adapting it to convenient occupation, BUT FOR NO OTHER PURPOSE. If the timber should be severed for the purpose of sale alone, in other words, if the cutting was the principle thing, and not the incident, then the cutting would be wrongful, and the timber when cut, become the absolute property of the United States. It was not taken from any portion of the land which was occupied, or, so far as it appears, intended to be occupied for any purpose inconsistent with the continued presence of the timber. It was cut for sale and nothing else. Under such circumstances, when cut, it became the property of the United States absolutely, discharge of any rights of the Indians therein. The cutting was waste."

In this case, the lands, sections 16, from which the timber has been cut, and from which the Indians threaten to cut all the timber, are not occupied in severalty by the Indians; it is not even pretended that such cutting was, and is to be done for the purpose of improving the land; the continued presence of the timber is not inconsistent with any occupancy, past or present, of the Indians; the cutting was, and is to be purely for the purpose of manufacture into lumber at the Indian saw-mill at Neopit, and subsequent sale, and such cutting was, and is to be the principle thing, and not incident to improvement.

So far as the right of the Indians to cut is concerned, this case is on all fours with the Cook case; its facts bring it squarely within those of that case, and the rules of law laid down there seem, of necessity, to be controlling here. The cutting and threatened cutting here was, and is only for the purpose of manufacture and sale, and any clearing which might be done would only be incident to such manufacture and sale, and therefore, was and would be wrongful and unlawful, and the committing of waste by the life tenants, to the irreparable harm of the remaindermen, the State of Wisconsin and its grantees, who own the fee.

The state and its grantees occupy, in this case, the same position, and are clothed with the same rights as to the timber involved herein, as the United States did in the Cook case. They own any timber which may have been wrongfully severed from their land, and are also fairly entitled to protection from this court, against any further wrongful cutting.

V.

The ownership of the Sections 16, by the State and its grantees, is, we contend, ownership in fee simple and no longer subject to any right of Indian occupancy by license, sufferance, or under the Treaty of 1854.

This, we believe, follows logically and necessarily from the fact that it appears here that all right of occupancy under prior treaties and under presidential extensions expired absolutely and finally on October 1st, 1852.

That the Indian's last vestige of claim, under the Treaty of 1848 and prior Treaties, finally terminated and expired October 1st, 1852, is plain, and we have called attention to the record showing that there was a President's order for the Menominees to remove and showing the subsequent extensions granted them, the last of which terminated October 1st, 1852.

That it was understood that all their rights of occupancy did so terminate October 1st, 1852, is further shown by the Act of Congress of August 30th, 1852, making provision for removing them from the ceded lands and placing them temporarily, on the Wolf and Oconto, on lands practically all of which had been ceded absolutely to the Government in 1836.

The fact that this authority of Congress was procured the 30th of August, 1852, and that thereunder the Indians were removed in October, 1852, shows the general understanding and knowledge that all Indian rights, under the Treaty of 1848, had expired, and that, therefore, the Indians would have to remove and accounts for the temporary removal at that time by authority of Congress to lands of the United States, nearly all of which had been ceded in 1836.

In other words, all rights of Indian occupancy, "as other Indian lands are held" or under Treaty, expired definitely and finally October 1st, 1852, and after that the Menominees at their temporary quarters on the Wolf and Oconto—the greater part of which had been ceded in 1836—were not occupying land "as Indian lands are held," but were remaining "temporarily" as licensees or at sufferance with the permission of the Government and the assent of the State.

This assent was, as this Court held in *Beecher vs. Wetherby*, only to such "temporary remaining" in the new location.

Such possession was not in the line of title under their old treaties. It was not title at all. It was merely the temporary location under a license terminable at will.

Therefore, it seems to us to follow that *the final vesting of the State's title* under the school grant gave them the full title to the fee in Sections 16.

The fee title of the State was subject *at most* to the temporary license given the Menominees to remain at the head waters of the Wolf and Oconto. The Indians "remained" on that location only until the Treaty of 1854, and the Treaty gave them a new location embracing the two Western Townships of the old location.

The final vesting of the title of the State was, however, not subject to any right of occupancy under the Treaty.

a.

Township 30 N. R. 15 E.; Township 28, N. R. 16 E.; Township 29, N. R. 16 E., and Township 30 N. R. 16 E. were all completely surveyed and the surveys approved as early as February 20th, 1854, and nearly three months before the Treaty of 1854 was proclaimed, and came into force on August 2nd, 1854.

Therefore within all the decisions it seems to be settled that the State and its Grantees in these four Townships acquired the full fee to Sections 16, and that the same is not burdened by any "occupancy right" given by the Treaty of 1854, because their right had vested and become a fee simple title prior to the Treaty.

b.

While in the other Townships, the surveys were not approved until after the Treaty became effective, yet, nevertheless, we claim that they, too, are not subject to the occupancy rights of the Menominees in the Reservation under the Treaty of August 2nd, 1854, because of the fact that the right of the State and its Grantees in and to all the Sections 16 vested and became definite and effective prior to the Indian rights under the Treaty of 1854 becoming effective. This arises from the fact that it has been determined that the State's title, though granted by the enabling act and accepted by the State Constitution of 1848, rested in compact, and did not become effective and vest until the surveys and their approval. However, when so vesting, they related back to the original grant.

On the other hand, by the express terms of the Treaty of 1854, under which the Menominees claim right of occupancy, we find their title and their grant was "according to the public surveys." Transcript 20.

Therefore, the Indian right, like the State right, could not become definite and vest, and be effective until the public surveys identified the land.

It was therefore a situation where the rights of both parties were to be made definite and vest upon the same acts.

Of course, in the case of the Sections surveyed and approved before the Treaty, there could be no question of their prior right.

But in the case of the other Sections 16, the right of the State became effective by the survey, and by the same survey the Indians' right was to become effective.

The State, however, had a grant or a right resting in compact from the time of its admission, and therefore it had the *oldest claim* and the *greatest equity*, and of two grants effective by the same Act, the older in point of time should, we think, prevail.

It will perhaps be said that the Indians had an old claim as "original occupants of the state."

That is why we have shown that the "old" Indian right of "occupancy," and *all* Indian rights under Treaties had finally ended, and been extinguished for valuable considerations on October 1st, 1852, and that thereafter the Indians "remained" at the head waters of the Wolf and Oconto—on lands, the main part of which had been ceded in 1836—not by virtue of any right of "Indian occupancy,," not by virtue of any right under any Treaty—but simply as Licensees subject to be removed at the will of the Government, or from the School Sections, at the will of the State.

To put it another way, the assent of the State to a mere temporary remaining was in its very nature, a temporary right terminable at will by either party, and on which naked "license" no claim of title, no tacking of ancient grants or rights can be made.

It would be a hard rule that would take from the State of Wisconsin her School Sections held for the education of her youth—because forsooth—in the hour of their need, and when all their rights to remain in Wisconsin had finally terminated—the State, out of kindness consented to the Indians remaining "temporarily" as Licensees on her School Sections—in lands the greater part of which were ceded by the Indians back in 1836.

We submit that any rights the Indians acquired in Section 16 by the assent of the State to their temporarily remaining on the Wolf and Oconto must be limited to a temporary right or license from the State, terminable at any time by either party, *and terminated so far as any claim could be made under that assent at the time of the subsequent Treaty.*

So that we believe that in the case of *this particular Reservation*, after full consideration of all the facts, and bearing in mind the high purposes to which the School Sections are devoted and the great abundance of land left for the small body of Indians, that it should now be held that the State of Wisconsin has been right in its position, ever since the surveys, in claiming that it was the owner of the entire fee in the School Sections, and not subject to any right of occupancy.

That the State has always taken, and even stubbornly maintained this position, is evidenced from the correspondence in the

record, from the fact of its early sales and patents, from its taxation of the land and from its ever making prompt claim for timber cut upon all trespasses upon these lands.

VI.

REGARDLESS OF THE NATURE OF THE INTEREST WHICH THE INDIANS ACQUIRED IN THEIR RESERVATION LANDS BY THE TREATY OF 1854, AT LEAST FOUR OF THE SIXTEENTH SECTIONS INVOLVED HERE HAD DEFINITELY AND IRREVOCABLY PASSED TO THE STATE AT THE TIME OF THE PROCLAMATION OF THAT TREATY.

Prior to August 2, 1854, the date of the proclamation of the Treaty of that year, the Sections 16 in Town 30, Range 15, and in Towns 28, 29 and 30, in Range 16, had been surveyed and the plats approved by the Surveyor General and thus fully defined and identified and the title to the fee vested in the State. Transcript, pages 293-298.

No sale or other disposition of those sections by the United States, subsequent to the date of the completion of these surveys, could defeat that appropriation.

Whatever title the United States had in and to these sections at the time of their identification by survey, passed to the State under the grant contained in the Enabling Act of 1846.

In *Cooper vs. Roberts*, 18 Howard 146, this court, in construing the compact under which Michigan was admitted into the Union, which is similar to the Wisconsin Act, said:

"We agree that until the survey of the township and the designation of the specific section, the right of the State rests in compact; binding, it is true, the public faith and depending for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But, when the political authorities have performed this duty, the compact has an object on which it can attach, and if there are no legal impediments, the title of the State be-

comes a legal title. The *jus ad rem*, by the performance of that executive act, becomes a *jus in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others."

In *Beecher vs. Wetherby*, *Supra.*, the court said:

"In this case the township embracing the land in question was surveyed in October, 1852, and was subdivided into sections in May and June, 1854. *With this identification of the section, the title of the State*, upon the authority cited (*Cooper vs. Roberts*), *became complete*, unless there had been a sale or other disposition of the property by the United States previous to the compact with the State. No subsequent sale or other disposition, as already stated, could defeat the appropriation."

In the case of *United States vs. Morrison*, 240 U. S. 192, this court had under consideration the Enabling Act under which Oregon was admitted as a State. The dispute was between the State's grantees of school lands and those holding under patents from the United States. The title of the latter was confirmed, because the United States had, by legislation, acted in such a manner toward the land in question *before the survey*, that it had been "disposed of" within the meaning of the Enabling Act. The Court said:

"Prior to survey, the designated section were undefined and the lands were unidentified . . . Congress did undertake, however, that these sections should be granted unless they had been sold or otherwise disposed of; *that is, that on the survey defining the sections, the title to the lands should pass to the State*, provided sale or other disposition had not previously been made."

The court quotes at length from the case of *Heydenfeldt vs. Daney Gold & S. Min. Co.*, 93 U. S. 934, where it was held that until the status of the lands was *fixed by a survey*, Congress reserved absolute power over them and until that time, could defeat the State's right to School Sections 16 and 36, and said:

"We regard the decision in the Heydenfeldt case as establishing a definite rule of construction The rule

which the Heydenfeldt case established has, we understand, been uniformly followed in the Land Office. After reviewing the cases, Secretary Lamar concluded (Dec. 6, 1887, *Re Colorado*, 6 Land Dec. 412, 417) that the school grant does not take effect until after the survey, and if at that date, these specific sections are in a condition to pass by the grant, the absolute fee to said sections immediately vests in the state and if at that date, said sections have been sold or disposed of, the State takes indemnity therefor."

So that the fee to those sections passed to the State before the 1854 Treaty was proclaimed and it was either the unincumbered fee, or one burdened with some kind of occupancy right in the Indians.

We contend that the occupancy of the Indians, after June, 1850, was a mere license to temporarily remain, granted to them by the President and which occupancy did not in fact cover the land in question; that even such temporary license was terminated in October, 1852, and from then on to the Treaty of 1854, the entire title to all this land, subject only to the State's right in school sections, was in the United States, and that such title, free from all rights in the Indians, passed to the State when the said sections were surveyed.

If, however, the court should conclude, in spite of the fact of the very probable issuance of the order of the President, terminating the Indians' right under the Treaty of 1848, given to them prior to June, 1850, still that the Indians had some occupancy rights in the land in and around the head waters of the Wolf and Oconto Rivers, then the State became possessed of the fee upon the survey of the land, subject to such occupancy rights, and that after survey, any such rights could not in any way be enlarged without the consent of the State or its grantees.

The Enabling Act provided:

"That section numbered 16 in every township of the public lands in the State, and when such section had been sold or otherwise disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted to said State for the use of schools."

These lands were public lands and had not been sold prior to survey; neither had they been otherwise disposed of before that time.

The court in *Ham vs. Missouri*, 18 Howard 126, construed the phrase "sold or otherwise disposed of" contained in the act under which Missouri became a state, as follows:

"Sold, necessarily signifying a legal sale by a competent authority, is a disposition, final and irrevocable, of the land. The phrase "or otherwise disposed of" must signify some disposition of the property equally efficient, and equally incompatible with any right in the state, present or potential, as deducible from the act of 1820, and the ordinance of the same year."

The court in *United States vs. Morrison*, in discussing the case of *Beecher vs. Wetherby*, and the rule there laid down as to property in this Menominee Reservation, determined that there had been no disposition of these lands by the United States prior to 1854, within the meaning of the Enabling Act, in this language:

"That is, the lands had been surveyed in 1854; *prior to that time there had been no other disposition of the fee by the United States.*"

If the Indians had between 1848, when they ceded all their land to the United States, and 1854, when the present reservation was created, any claim to temporary occupancy rights, such rights were certainly less than those which they acquired in their reservation lands by the Treaty of 1854. This Treaty gave them the reservation to be "held as Indian lands are held."

Under the rule laid down in the case of *United States vs. Cook*, 86 U. S. 595, Indians holding land "as Indian lands are held" cannot cut the timber thereon unless the cutting is done in good faith for the purpose of agriculture, and such purpose must be the principal thing and the cutting of the timber the incident only, and any cutting beyond that is waste and unauthorized.

Manifestly then, under this less than Reservation rights, if any, which the Indians had between 1848 and 1854, no greater

rights to cut the timber by or for them, than those fixed and outlined in the Cook case, can be claimed for them, and the cutting already done and that threatened, is and would be unlawful.

JURISDICTION.

It is our understanding that the question of the jurisdiction of this court to entertain this bill has been disposed of by this court by its decision denying defendant's motion to dismiss the bill.

If, however, that question is still open, we respectfully ask to refer the court to our argument in our brief in opposition to the defendant's motion to dismiss the bill in this case. Pages 11-15; also pages 33-37 and 45-46 and the authorities there cited.

IN CONCLUSION.

We submit that the ownership of the timber which the Department is threatening to cut on the Sections 16 is in the State of Wisconsin and its grantees, and that they are entitled to have their title determined and decreed by the judgment of this honorable court, and to have an injunction preventing the defendant, his agents, servants, employees and officers and the Menominee Indians from in any manner interfering with said land and perpetually restraining them from entering upon said lands and cutting and removing the timber therefrom and from committing waste thereon and from in any manner interfering with the enjoyment of the State of Wisconsin and its grantees of the full ownership thereof.

Respectfully submitted,

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Attorney General of Wisconsin.

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Of Counsel for Complainant.

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In the Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 7, ORIGINAL.

THE STATE OF WISCONSIN, COMPLAINANT,

v.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR.

IN EQUITY

BRIEF AND ARGUMENT FOR DEFENDANT.

CHARLES D. MANAFFIN,

Solicitor.

C. EDWARD WRIGHT,

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In the Supreme Court of the United States.

OCTOBER TERM, 1917.

THE STATE OF WISCONSIN	}	No. 7, Original. In Equity.
v.		
FRANKLIN K. LANE, SECRETARY OF the Interior.		

DEFENDANT'S BRIEF.

At the October Term, 1914, the court overruled our motion to dismiss the bill of complaint in this suit, without prejudice and with leave to answer. An answer was duly filed. Plaintiff filed a replication. The court appointed a commissioner to take the evidence. The evidence has been taken and the attorneys for plaintiff and defendant, by stipulation, have caused to be printed the material portions of the evidence as a "transcript of record."

STATEMENT OF THE CASE.

The purpose of the bill is to acquire a decree that the title to each section 16 in the several townships now composing the Menominee Reservation in Wisconsin passed to the plaintiff under its school land grant and now vests either in the State or its grantees, and to secure an injunction restraining the defendant and the Indian occupants of the lands from entering said sections and cutting timber therefrom, from committing waste thereon, and from in any manner interfering with their use, possession, or enjoyment of

any part of the lands, or from interfering with the plaintiff or its grantees in the exercise of acts of ownership.

The reservation at present, and at the time of the institution of this suit, comprises townships 29 and 30, ranges 13 and 14, and townships 28, 29, and 30, ranges 15 and 16 east.

The averments in the bill of complaint are, in the main, admitted in the answer. Paragraphs 18-20, 25-26, 28, 32, 35, 40-42, and 51 are denied. The averments thus put in issue concern the dates of survey with reference to Indian occupation and the treaty of May 12, 1854 (by which the reservation was created), the lands involved in the Indian cession of September 3, 1836, the occupancy of the present reservation on October 18, 1848 (the date of the cession by treaty of the lands remaining in the Menominee tribe), and whether in accordance with the last-mentioned treaty the President ever ordered the removal of the Indians from the ceded tract, and the nature, purpose, and result of the cutting of the timber sought to be enjoined.

The evidence taken in the case substantially sustains the position taken by the defendant in the answer, as will later develop.

History.

The Menominee Indians originally occupied and claimed the ownership of a large part of the State of Wisconsin. The nature of their ownership was of sufficient dignity to warrant the acquisition of their

holdings by the United States through the medium of treaties of cession. Map I, attached to our brief in support of the motion to dismiss, shows their original territory and the portions successively ceded to the Government. The land first ceded by the treaty of 1831 is easterly of Green Bay, the Fox river, and Lake Winnebago and does not concern this suit. Land immediately west of those natural boundaries was next ceded by the treaty of 1836. The evidence in this case does not make it wholly clear as to where the westerly boundary actually was, but it was probably near the range line between ranges 16 and 17. Map I, prepared in the Indian Office since the institution of this suit, shows that all of townships 28, 29, and 30 in ranges 17, 18, and 19, lie within the ceded tract of 1836, and that as far as the land in controversy in this suit is concerned, section 16 of T. 28, R. 16, may be within the 1836 cession, together with a little more than half of sec. 16, T. 29, R. 16, while sec. 16, T. 30, R. 16, is without the exterior limits of the 1836 cession.

Wisconsin's enabling act was approved August 6, 1846. The State was admitted to the Union on May 29, 1848. The enabling act, in sec. 7, contained a provision that is at the foundation of this suit (the italics being ours):

That section numbered 16 in every township of the *public lands* in said State, and when said section has been sold *or otherwise disposed of*, other lands equivalent thereto and as contiguous as may be, *shall be granted* to said State for the use of schools.

The Indians, on the last mentioned date, still held a large portion of their original country. The tract is shown on the map aforesaid. Clearly, in 1848, the land was not public land of the United States but land to which the Indian title still attached. This is shown by the fact that on October 18, 1848, the Government negotiated a third treaty with the Indians looking to the cession of this, the remainder of their holdings. The treaty was ratified January 23, 1849. By it all the land within the green lines of our map attached to our motion to dismiss (which we shall hereafter call "Map I" for convenience), was ceded to the United States. In exchange the Indians were granted lands west of the Mississippi. By art. 8, they were permitted "to remain on the lands hereby ceded" for two years from October 18, 1848, "*and until the President shall notify them that the same are wanted.*"

The Indians did not like the land set aside for them west of the Mississippi. They desired to remain in Wisconsin. In August, 1850, they petitioned the President (Plaintiff's Exhibit A) for leave to remain.

In that petition they recite that "They had already been notified that the United States *will expect* them to remove to the new home" by October 18, 1850.

This statement appears to be the plaintiff's sole authority for the averment in the bill (par. 28, Transcript, p. 22) that the President "did notify" the Indians that the land was wanted and "ordered them removed."

The petition is addressed to the President. The signers do not refer to any order of removal made by him. It reads as if the agent or some one had notified them, not that the President had ordered their removal, but that they were expected to remove by the date mentioned in the treaty.

At any rate, the testimony shows no evidence of such an order emanating from the President, although diligent search was made and copies of other orders extending their time were found. (Testimony of Kinney, Trans., p. 223 *et seq.*) The original of Exhibit "A" was found and the extensions. The plaintiff has failed utterly to furnish any affirmative proof sustaining the averment that an Executive order for removal was ever made.

The President granted permission September 5, 1850, for them to remain until June 1, 1851 (Trans., p. 273). In his letter he makes no reference to any antecedent order which he thereby revokes. He saw no objection to granting their request. May 29, 1851, he again extended the time until June 1, 1852 (Plaintiff's Exhibit I, Trans., p. 41).

In 1851 the Indians were evidently looking about for a location in their own country in lieu of the lands ceded to them west of the Mississippi—land about the Wolf and Oconto Rivers, where they now are. (Trans., p. 274). Superintendent Murray reported to the Commissioner of Indian Affairs on the new location September 30, 1851. From the recitals in his letter (Trans., p. 274) he had explored the land about the Wolf and Oconto Rivers in pursuance of

instructions "to explore a northern location for the Menominee Indians." He commenced at the southwest corner of township 28 on the range line between 19 and 20 and ran west 30 miles, north 18 miles, and thence back east and south, making a rectangle which, as he commenced on a range and township corner, would conform to ultimate public surveys.

By act of Congress August 30, 1852 (10 Stat. 41, 47), money was appropriated for the removal of these Indians to the above described tract, reference being made in the act to Murray's report.

In the meantime, the President had again extended the time for removal from their southern location, the new date being October 1, 1852 (Trans. pp. 275-276).

October 19, 1852, the Menominees commenced to move to land between the Wolf and Oconto Rivers (Trans. p. 238). By November, they had settled on the location of their present reservation. The Oconto runs through the townships in range 17; the Wolf River is in range 15. The Indians thereto removed apparently were widely scattered, as the report of the superintendent speaks of the removal of those living on the Oconto and Menominee Rivers. The bill alleges (Trans. p. 23) that at the time of the survey of the lands in controversy the Indians were occupying land north of the Fox River and west of the Wolf River, particularly around Lake Winneconne.

The schedule of surveys contained on pp. 293-298 of the transcript shows that only a very few exterior township lines had been run before the middle of

October, 1852, that some were in the course of being run during the time of the removal, and that none of the section lines had been surveyed until subsequent to the arrival of the Indians.

November 30, 1852, the Commissioner of the General Land Office reported to the Secretary of the Interior (Trans. p. 240) that the Indians were pleased with the new location and were anxious to remain there permanently. "Should this be assented to by Legislature of Wisconsin," arrangements could be made on terms mutually advantageous to the Indians and the Government, the Commissioner reported.

February 1, 1853, the State of Wisconsin by joint resolution of its legislature gave its consent. The full text is on page 244 of the transcript. It provides:

That the assent of the State of Wisconsin is hereby given to the Menominee Nation of Indians to remain on the tract of land set apart for them by the President of the United States, on the Wolf and Oconto Rivers, and upon which they now reside, the same being within the State of Wisconsin aforesaid, and described as follows, to wit:

Commencing at the southeast corner of township 28 north, range 19, running thence west thirty miles, thence north eighteen miles, thence east thirty miles, thence south eighteen miles, to the place of beginning.

This describes the tract practically in the terms of Superintendent Murray, *supra*, shows that the Indians were already residing thereon, that the land had been "set apart" for them by the President, and that the land was not yet to be identified by townships and ranges except as to the initial point.

On November 26, 1853, the Commissioner made a report to the Secretary (Trans. p. 250) in which he stated that these Indians had ceded their entire country in 1848 and had agreed to move west of the Mississippi, from which obligation they had been exempted by the President, who, with the "approbation" of the proper State authorities, had assigned to them land in "a remote portion of the extensive tract which they had ceded." He recommended that if the arrangement was to be made of a permanent character, it would be necessary to enter into a new convention whereby the country ceded to them by the treaty of 1848 would be relinquished to the Government.

This was the genesis of the treaty of May 12, 1854, reproduced on pp. 18-20 of the transcript. That was a treaty "supplementary and amendatory" to the treaty of October 18, 1848. By the first article, the Indians receded and relinquished the land west of the Mississippi, and in consideration thereof, the United States gave to the Indians "for a home to be held as Indian lands are held," the present reservation, viz, commencing at the southeast corner of township 28, range 16, thence west 24 miles, north 18

miles, east 24 miles, and south 18 miles, to the place of beginning, the same being Ts. 28, 29, 30, Rs. 13, 14, 15, and 16. In consideration of the "difference in extent between the lands hereby ceded to the United States and the lands given in exchange," the Government agreed to pay the Indians \$242,686.

The treaty of 1848 had granted the western lands to the Menominees for a home to be held as Indian lands are held—the language of the treaty of 1854. They were to acquire the same sort of title to the reservation as they were to have enjoyed in the trans-Mississippi tract.

All the townships in ranges 17, 18, and 19 were excluded from this cession. Map I shows that the excluded townships were within the tract ceded in 1836 and were not a part of the land ceded by the treaty of 1848. Possibly that was the reason—so that the permanent reservation might include only land that the Indians had never ceased to occupy.

Townships 28 in ranges 13 and 14 may be eliminated from the case at this point, because they are the townships subsequently sold to the Stockbridge and Munsee Indians and are not involved in the case at bar.

Neither is township 30, range 16, because whatever interest the plaintiff ever had in section 16 of that township was conveyed by grantees of the State to the United States in 1899 and 1900 (Trans. p. 69).

This leaves actively in controversy Ts. 29 and 30, Rs. 13, 14, and 15, T. 29, R. 16, and Ts. 28, Rs. 15

and 16. Reference to the schedule of surveys (Trans. pp. 293 *et seq.*) will show that survey of the sectional lines of these townships was completed and approved as follows, beginning with the earliest approval:

	Completed.	Approved.
Twp. 28, R. 16.....	Sept. 13, 1853	Feb. 20, 1854
Twp. 29, R. 16.....	Sept. 12, 1853	Do.
Twp. 30, R. 15.....	Sept. 11, 1853	Do.
Twp. 29, R. 13.....	July 31, 1854	Oct. 11, 1854
Twp. 29, R. 14.....	July 7, 1854	Do.
Twp. 30, R. 13.....	Nov. 21, 1854	Feb. 6, 1855
Twp. 30, R. 14.....	Nov. 3, 1854	Do.
Twp. 28, R. 15.....	May 27, 1891	Aug. 28, 1891
Twp. 29, R. 15.....	July 2, 1891	Oct. 3, 1891

None of the four townships not included in the tract described in the joint resolution passed by the State of Wisconsin February 1, 1853, but included in the treaty of May 12, 1854 (i. e., T. 29 & 30, R. 13 & 14), was surveyed subdivisionally until after the cession of 1854; nor were such surveys approved until subsequent even to the proclamation of the treaty, August 2, 1854. Of the remainder of the tract, including T. 30, R. 16 (surveyed July 29, 1853), embraced both by the joint resolution and the treaty of 1854, four townships (T. 30, R. 15, and Ts. 28, 29, and 30, R. 16) were surveyed in 1853, after the Indians had removed thereto and were residing thereon; and the other townships, 28 and 29, in range 15, were not surveyed until 1891.

ARGUMENT.

I.

Beecher v. Wetherby.

The facts recited in our "History" are common to *Beecher v. Wetherby* (95 U. S. 517) and this case, to the point to which the narrative has taken them; but the court was not fully advised as to details, important in the decision of recent cases, when the *Beecher* case was under consideration.

The evidence in this case emphasizes the continuing relation of the Indian to the land in controversy. When Wisconsin became a State and the school-land grant became operative, this land was still land of the Menominees just as it had been for generations. Their title still existed in its fullness. It was an occupancy right, of course, the fee being in the sovereign—the United States. After the admission of the State, the Indians agreed to cede their land, which means merely their occupancy rights in the land, to the Government. But the deed of cession retained in them the right to remain—that is, to continue to occupy—for two years *and* "until the President shall notify them that the same are wanted." The President never required them to remove. On the contrary, he issued orders under which they remained in their old homes until 1852, when they migrated to another part of their land with the acquiescence of Congress and the assent of the State of Wisconsin. An Indian tribe "occupies" all the tribal land, although

necessarily but a small portion is covered by their "homes" from time to time. In that part to which they went they have since remained under a treaty which was amendatory and supplementary to the treaty of 1848. They were there when the subdivisional surveys were made; they were there before any of those surveys were approved; and as to two-thirds of the sections now in controversy, the treaty establishing the present reservation was completed, ratified, and promulgated before approval of the surveys.

These facts point away from the situation presented to the court in the *Beecher* case to that which marked the *Thomas* case (151 U. S. 577) and *Wisconsin v. Hitchcock* (201 U. S. 202), where comment is made on the facts that the Indians (in those cases the Chippewas) had never been removed from the lands ceded and that no Executive order had ever been made for their removal. Moreover, we can say, in paraphrase of an expression in the *Thomas* case, that "no change has taken place in their occupancy of the lands except as provided by the treaty of" May 12, 1854. Furthermore, in the *Beecher* case, the court sets forth that the section lines in the township involved in that case were surveyed in May and June, 1854—dates antecedent to August 2, 1854, when the treaty of May was promulgated—the date when it became "effective" (Plaintiff's brief, p. 13, *Beecher v. Wetherby*, *supra*, p. 527). But a survey is not effective until it is approved (*U. S. v. Morrison*, 240 U. S. 192); and in the case at bar the surveys of six of the

townships were not approved until after August 2, 1854—four by the surveyor general according to the practice prior to 1879 and two by the Commissioner in 1891.

So, in considering the bearings of the *Beecher* case upon this controversy, other elements, the importance of which has been developed by later decisions of this court, must be considered.

And after all, what did the court hold in the *Beecher* case? It was dealing with a case the practical aspects of which were utterly unlike this case. The Indian and his rights were eliminated. There was no balancing of the obligation the Government owed to the State and an equally potent obligation that it owed to the Indians. Whatever the Indians' rights had been, they were terminated. The Indians had left the land, ceding all their title or right to the Government. The land thus became a part of the *disposable* public domain, unencumbered by any right or easement in another, so that any qualified person could acquire title under any applicable public-land law. The United States undertook to convey to Beecher at a time when there was no reason, moral, legal, or practical, why the State should not have section 16 under its school-land grant. That grant, applying the apt reasoning of this court in the *Morrison* case, was not a grant *in praesenti*. "Shall be granted" is not language of a present grant. It imports a promise executory in effect to give the described lands when the Government would be in a position to invest the State with

a utilizable title—or if the Government had sold the described section or had “otherwise disposed of” it, other equivalent lands were to be granted. A sale, of course, involves a permanent disposition of the land. A forest reservation or an Indian reservation does not necessarily mean a permanently adverse disposition of the land, because a national forest in whole or in part may be restored by Executive order to the disposable public domain and an Indian reservation may become extinguished—the situation in the *Beecher* case. Yet in the *Morrison* case a national forest defeated, at least for the time being, the grant to the State of the school sections within its confines; just as here, we claim, the Indian occupation of the land defeats, for the time being at least, the grant to the State. If we correctly understand the *Morrison* case, the State is in a position now to seek other land in lieu of the lost sections, just, as we think, the State of Wisconsin, particularly in view of its joint resolution of assent to the appropriation of a part of these lands to the use of the Indians, has been in a position to take other equivalent lands to indemnify the loss.

As we have said, when the *Beecher* case was before this court the Indian reservation, so far as the section there in controversy was concerned, was not in existence. There was no reason why the State or its grantee should not enjoy the benefit of the school land grant and there was no reason why the United States should then fail in its obligation and attempt to give the land to another. The court commented

on the fact that the Menominees had been permitted to remain and the United States, by treaty, had "ceded to them certain lands for a permanent home" (i. e., the land here in controversy)—two townships of which were afterwards ceded to the Stockbridge and Munsee Indians.

But when the logs in suit were cut, those tribes had removed from the land in controversy, and other sections had been set apart for their occupation.

It is undeniably the fact that there is language in the *Beecher* decision which supports the view that upon identification of each section 16 by survey, the naked fee to that section passed to the State subject to the Indian right of occupancy; that the right of possession and enjoyment incident usually to the ownership of the fee became suspended as to the State pending the Indian occupancy; but that as soon as the Indian right became extinguished, the right of possession reunited with the fee, perfecting the State's right under its school land grant. It mattered not in the *Beecher* case whether the court took that view or the other view—that the State's right in no sense, other than as an inchoate right, attached until the land was free from an adverse claim in a third party—i. e., had become a disposable part of the public domain, so that no question was presented except one between the donor of the school grant and its grantee, the State. The practical result would have been the same. If the court had

not spoken, it would be obvious to everyone that Beecher's right was inferior in every aspect to that of Wetherby.

In view of decisions by this court since 1877, when the *Beecher* case was decided, we find our minds impelled to a conclusion which we respectfully suggest to the court: That were the *Beecher* case now on trial before this court, while the judgment would still be "that the plaintiff acquired no title by his patents to the land in question, and, of course, no property in the timber cut from it," that result would ensue from consideration of a single element, sufficient in itself to sustain the conclusion—viz, that when freed from the Indian right, there was no obstacle in the way of the State's title (the fee united with possession) immediately and completely attaching so that it was not within the intention of Congress nor within its power to authorize the disposal of the land under the public land laws.

In *Wisconsin v. Hitchcock*, *supra*, the plaintiff was advancing the same claim that it makes in this suit and was asking for an injunction to prevent the defendant from interfering in anywise with its use, possession or enjoyment of the sections 16 within the La Pointe and Flambeau Indian Reservations-Chippewa Indian lands.

Unlike the case at bar, the Chippewas had ceded their land (within which the two reservations were located) prior to the enabling act of 1846 or the admission of Wisconsin to the Union. The treaty of cession, made in 1843, stipulated that the Indians

should have the right of hunting on the ceded territory with the other usual privileges of occupancy "until required to remove by the President of the United States"; just as in this case, the Indians stipulated for the privilege of remaining on the ceded territory for two years "and until the President shall notify them that the same are wanted."

The Chippewas were never required to remove by the President; nor were the Menominees.

The Chippewa Indians remained; so did the Menominees. In 1854, the Chippewas and the United States made another treaty; so did the Menominees and the United States in the same year.

In the Chippewa treaty, certain lands were set apart for the use of these Indians as a reservation; and those lands "*were part of the lands ceded to the United States by the treaty of 1843*" (the italics appear in the published decision). So, in this case, certain lands were set apart as a reservation for the Menominees; and those lands *were part of the lands ceded to the United States by the treaty of 1848*.

In the Chippewa case, the State claimed that since its admission to the Union, it had claimed all lands in sections 16 within the reservation, especially since the sectional surveys, and had sold portions thereof to persons and corporations who had paid taxes thereon and had cut and hauled timber therefrom until forbidden by the Secretary of the Interior; and in this Menominee case, the same claims are advanced by the plaintiff.

In the Chippewa case, the plaintiff claimed, as they do in this case, by their bill, that the inclosing township and range lines were actually surveyed prior to 1854.

This court dismissed the bill in *Wisconsin v. Hitchcock*, finding that the State was not entitled to the relief sought on the authority of two cases, *U. S. v. Thomas* (151 U. S. 577) and *Minnesota v. Hitchcock* (185 U. S. 373). *Beecher v. Wetherby*, also cited and relied upon by plaintiff, was not mentioned.

It is interesting to note that Mr. Justice Harlan, who wrote the opinion in the *Wisconsin* case, began his long and distinguished career as a member of this court shortly after the *Beecher* decision, his first opinion appearing at p. 673 of the volume in which the *Beecher* case is reported.

The *Thomas* case involved another Chippewa reservation (La Court Oreilles) carved out of the lands ceded by those Indians in the treaty of 1843. Thomas murdered another Indian on a section 16 within that reservation. The case presented a question of jurisdiction between State and Federal courts. Thomas contended, as plaintiff contends in this case, that section 16 was ceded to the State by the provisions of the enabling act and that it could not be subsequently taken by the United States as part of the Indian reservation. The court said:

The Indians have never been removed from the lands thus ceded (meaning by the treaty of 1842) and no executive order has ever been made for their removal and no change has

taken place in their occupancy of the lands except as provided by the treaty of September 30, 1854, 10 Stat. 1109. By that treaty the Chippewas ceded a large portion of their territory, previously retained in Wisconsin and elsewhere, and provision was made in consideration thereof for the formation of permanent reservations for their benefit, each to embrace three full townships and their boundaries to be established under the direction of the President. One of these included the tract comprised in the La Court Orielles Reservation. In the provision for these reservations nothing was said of the sixteenth section of any townships, and it is clear that it was not contemplated that any section should be left out of any one of them. The land reserved was to be, as near as possible, in a compact form, except so far as the meandered lakes were concerned. When the townships composing these reservations were surveyed, the sixteenth section was already disposed of in the sense of the enabling act of 1846. It had been included within the limits of the reservations. As it will be seen by the treaty of 1842, ratified in 1843, which was previous to the enabling act, the Indians stipulated for the right of occupancy to the lands. That right of occupancy gave them the enjoyment of the lands until they were required to surrender it by the President of the United States, which requirement was never made. Whatever right the State of Wisconsin acquired by the enabling act to the sixteenth section was subordinate to this right of occupancy for which the Indians stipulated

and which the United States recognized. The general rule established by the Land Department in reference to the school lands in the different States is that the title to them vests in the several States in which the land is situated, subject to any prior right of occupation by the Indians or others which the Government had stipulated to recognize. * * *

We therefore are of opinion that by virtue of the treaty of 1842, in the absence of any proof that the Chippewa Indians have surrendered their right of occupancy, the right still remains with them, and that the title and right which the State may claim ultimately in the sixteenth section of every township for the use of schools is subordinate to this right of occupancy of the Indians, which has, so far as the court is informed, never been released to any of their lands, except as it may be inferred from the provisions of the treaty of 1854. That treaty provided for the permanent reservations, which included the section in question. The treaty did not operate to defeat the prior right of occupancy to that particular section, but, by including it in the new reservations, made as a condition of the cession of large tracts of land in Wisconsin, continued it in force. The State of Wisconsin, therefore, had no such control over that section or right to it as would prevent its being set apart by the United States with the consent of the Indians, as a part of their permanent reservation. So, by authority of their original right of occupancy, as well as by the fact that the section is included within the tract set aside as a portion

of the permanent reservation in consideration of the cession of lands, the title never vested in the State, except as subordinate to that right of occupation of the Indians.

Applying the rulings of the court in the *Thomas* case to the case at bar, we have the following:

The Menominees have never been removed from the lands ceded by the treaty of 1848 and no Executive order has ever been made for their removal, and no change has taken place in their occupancy except as provided by the treaty of 1854, which restricted their occupancy to the limits of the reservation containing the sections 16 in controversy. Nothing was said in the treaty of 1854 of the sixteen sections and it is clear that it was not contemplated that any section should be left out. When the townships composing the reservation were surveyed each section 16 was already disposed of in the sense of the enabling act of 1846. The treaty of 1848 stipulated for the right to remain on the ceded lands for two years and until notified by the President that the lands were wanted. That right of occupancy gave them the enjoyment of the lands until they were required to surrender them by the President. Whatever right the State acquired was subordinate to the occupancy right. It follows that, by virtue of the treaty of 1848, the right remains in the Menominees and that the title and right which the State may ultimately claim (i. e., upon proof that the Indians have surrendered their right

of occupancy) is subordinate to the Indian right, except as to lands covered by the treaty of 1848, situate without the confines of the tract described in the treaty of 1854. That treaty provided for the permanent reservation which includes the sections in controversy. The treaty did not operate to defeat the prior right of occupancy. The State could not prevent the setting apart of this land as a permanent reservation for the Indians; in fact, as to all but four sections the State specifically gave assent that the Indians should remain on the tracts set apart for them by the President. And this reservation was set apart for them by the treaty of 1854 "to make exchange of the lands given west of the Mississippi for those desired by the tribe, and for the purpose of giving them the same for a permanent home." Wherefore, the Menominees agreed to "cede, sell, and relinquish to the United States" the trans-Mississippi lands, in consideration of which cession the United States agreed to "give" them the tract embracing the sections in controversy. To conclude the application of the *Thomas* decision to this case we can now quote literally and appositely:

So, by authority of their original right of occupancy, as well as by the fact that the section is included within the tract set aside as a portion of the permanent reservation in consideration of the cession of lands, the title never vested in the State, except as subordinate to that right of occupation of the Indians.

II.

The Question of Survey.

In *Cooper v. Roberts* (18 How. 173, 179), this court said:

We agree that until the survey of the township and the designation of the specific section, the right of the State rests in compact—binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object, upon which it can attach, and *if there is no legal impediment* the title of the State becomes a legal title. The *jus ad rem* by the performance of that executive act becomes a *jus in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others.

In *Heydenfeldt v. Daney Gold, etc., Company* (93 U. S. 634), the court held:

Until the status of the lands was fixed by the survey and they were capable of identification, Congress reserved absolute power over them.

That case involved the school grant to Nevada which contained the words "by any act of Congress" in addition to the phrase "otherwise disposed of," found in the Wisconsin enabling act. "But," as the court said in the *Morrison* case, *supra*, "this does not mark a distinction, as 'otherwise disposed of,' of

course, implies that the disposition shall be by competent authority." In the case at bar it was by a treaty ratified by the Senate and proclaimed by the President.

In the *Morrison* case, the appellees relied upon the *Beecher* case in opposition to the *Heydenfeldt* case.

After describing the facts peculiar to these cases, the court said:

That is, the lands had been surveyed in 1854; prior to that time, there had been no other disposition of the fee by the United States; the title had vested in the State subject at most to the Indian occupancy, and this had terminated. There was abundant reason for the decision that these lands were not embraced, and were not intended to be embraced, in the provisions for sale made by the act of 1871. *What was said in the opinion must be considered in the light of the facts (Weyerhaeuser v. Hoyt, 219 U. S. 380, 394).* The *Heydenfeldt* case was not cited and can not be regarded as overruled.

The court then stated that the *Heydenfeldt* rule had been uniformly followed in the land office, citing a decision by Mr. Secretary Lamar to the effect that a school grant does not take effect until after survey.

In *Minnesota v. Hitchcock* (185 U. S. 375), Congress, before any survey of the lands and therefore before the State's rights had attached to the school sections, had authorized sales of certain Chippewa lands, and the suit was to enjoin the sale of any sections 16 and 36 in the Red Lake Indian Reserva-

tion. The court cited the *Heydenfeldt* case with approval and dismissed the bill.

Finally, in the *Morrison* case, the court dealt with a forest reservation in Oregon, embracing land containing school sections, created between the time when the survey was actually made in the field and when approved by the Commissioner of the General Land Office.

The court said:

We conclude that the State of Oregon did not take title to the land prior to survey; and that until the sections were defined by survey and title had vested in the State, Congress was at liberty to dispose of the land, its obligation in that event being properly to compensate the State for whatever deficiencies resulted.

If title passes upon survey, the court held that it must be upon a survey duly completed according to the authorized regulations of the department; and the court denied the application of the doctrine of relation.

Prior to 1879 the rules did not require the approval of a survey by the Commissioner; the surveyor general approved the surveys.

In the *Morrison* case the President's proclamation, issued prior to approval of the surveys, created a national forest and defeated the State's right under its school-land grant. The land was land of the United States before the proclamation. The creation of the reservation did not change the title; it merely affected the status.

On August 2, 1854, the President, acting under a treaty ratified according to law by the Senate, set apart this Menominee Indian Reservation as a permanent home for these Indians. It "gave" the lands to the tribe. Perhaps this did not change the title—devest the United States of the fee—any more than the President's action did in relation to the Oregon lands. But it certainly "disposed" of them quite as much as the creation of the national forest "disposed" of the Oregon school lands.

What, now, was the status of the townships on August 2, 1854, regarding survey?

The survey of townships 29 in ranges 13 and 14, while completed in the field in July, 1854, was not approved until October 11, 1854.

The survey of townships 30 in ranges 13 and 14 was not completed in the field until November, 1854, and was not approved until February 6, 1855.

The survey of townships 28 and 29 in range 15 was not completed until May and July, 1891, and was not approved by the Commissioner of the General Land Office until August and October, 1891.

Applying the rulings of this court in the *Morrison*, *Heydenfeldt*, *Minnesota* and *Cooper* cases to these six townships, we contend that even if it be true, as the State of Wisconsin urged in the *Wisconsin* case (201 U. S., at p. 209) "the *jus ad rem* arose simultaneously with the birth of the State," here the *jus in re*, mentioned in the *Cooper* case, has not seen its natal day. We submit that on the authority of the cases cited, the fee has not yet vested in the State of Wisconsin;

that the sections in those six townships have been "otherwise disposed of"; that the rights of the State have been defeated or at least have abated during the period of this adverse disposition which perhaps may last forever; and that as to these six sections, the plaintiff is not entitled to any part of the relief it seeks or to any relief whatever, because it has, and has had, no right, title, or interest in the lands entitling it to maintain this or any suit in respect to said lands.

As to the four remaining townships, we have shown in the "History" that the school section in T. 30, R. 16 has been conveyed to the United States, and the plaintiff has no rights therein requiring or permitting assertion.

Ts. 30, R. 15, and Ts. 28 and 29, R. 16, were surveyed in September, 1853, and the surveys were approved February 20, 1854, prior to the treaty of May 12, 1854. Thus we distinguish these townships from the other six because of this distinction in fact. But we think the same conclusion is reached on the authority of *Wisconsin v. Hitchcock* and the *Thomas* case. Those townships lie in ranges which were within the tract to which the Indians moved in October, 1852, and to which in February, 1853, the State gave its consent that they might remain. The State's right had not vested and could not possibly vest until approval of survey in February, 1854. The State, by its joint resolution, did not attempt to convey a title; it had none, not even the

naked fee, to convey. It waived its inchoate *jus ad rem*. The State was probably glad to assist in the confinement of these Indians to a few townships so that their embarrassing claims to the vast number of other townships within the cession of 1848 might be released. We maintain that the State is now estopped to assert any claim to these sections. The judgment of this court in the *Beecher* case is no obstacle to this conclusion, as the townships in which the Stockbridge and Munsee Indians were interested and which they abandoned were not among those included in the joint resolution of February, 1853.

To recur to the *Thomas* case: The court held that by authority of their original right of occupancy, as well as by the inclusion of the section within a permanent reservation, title never vested in the State—"except as subordinate to that right of occupation of the Indians"; a point we shall shortly consider.

III.

The State has no such Interest in Any of the Conveyed Sections as Entitles it to Maintain this Suit.

In our motion to dismiss, which was overruled without prejudice, we made the point that the plaintiff had failed to show a right, title, or interest in any of the land such as entitled it to maintain the suit. In the third part of our brief in support of that motion, we pointed out that the plaintiff had not set up any contract, covenant, or warranty entitling it to maintain this suit as to the sections it had disposed of.

According to paragraph 23 of the bill, the State still owns only two of the sections, having disposed of the balance. In the next paragraph the State claimed that it was legally bound to defend and protect its purchasers and their title to the lands and that the State would be liable to them in damages if their title failed.

In our answer (Trans. p. 52) we demanded proof as to these conveyances and especially as to which sections the plaintiff still claimed title.

On pages 287-91, plaintiff's exhibit No. 115, shows what lands have been sold. Every section has been sold except section 16 in townships 28 and 29, range 15. ^{Township 28 to range 15} Section 28, townships 13 and 14, are the Stock-bridge townships and are not involved in this suit. The court will observe that the ^{sections 16} townships in 28-16, 29-13, 29-14, 30-13, 30-14, 30-15, and 30-16 were sold in 1857-8—20 years before the decision in the *Beecher* case; and that 29-16 was sold in 1888-1898. ^{section 16} We think, in passing, that this disposes of the claim that the lands were sold on the faith of the *Beecher* decision as a "rule of property."

This leaves in the State, un conveyed, merely their claimed title to sections 16, townships 28-29, range 15—the townships which were not surveyed until 1891.

On page 286, there will be found a copy of the deed such as the State issues. (Trans. p. 194.)

There is not a word of warranty in it.

It bargains, sells, grants, and conveys the described land. It does not warrant title or undertake to defend title.

It leaves the plaintiff without a vestige of right to maintain any action (32 Cyc. 1332) except as to the two townships in range 15; and those townships were not identified by survey until 37 years after their inclusion in the reservation by the treaty of 1854.

IV.

Even if the State has any Present Right in the School Sections, Subordinate to the Right of Occupation of the Indians, no Waste is Shown Justifying the Injunction Sought by the Bill.

In the *Thomas* case the court ruled that title never vested in the State "except as subordinate to the right of occupation of the Indians."

This marks the limit of any title the State might assert—at the most a naked fee with the possession, occupation, and enjoyment in another.

We think it is clear that from any point of view neither the State nor its grantees are entitled to the present use, possession, or enjoyment of any part of the land in controversy, nor are they entitled to an injunction restraining the defendant or the Indians from any act that would interfere with such use, possession, or enjoyment. The *Wisconsin* case settles this point.

But the court is also asked to enjoin the defendant and the Indians from entering upon said tracts and from cutting timber therefrom and from committing waste.

The plaintiff shows such title as it ever had, still retained in itself, only as to two sections—those in

Ts. 28 and 29 of R. 15. All other sections it has sold by conveyances efficient to transfer any title it ever had to others not parties to this suit. Those conveyances contain no covenant of warranty. No interest whatever is retained in the State. If the the ownership of the timber is incident to the ownership of a naked fee, the timber belongs to the grantees and not to the State. On no theory, even if a full title were once in the State, is it easy to see how the State is in a position to demand an injunction against timber cutting, except as to the two sections in range 15. But as to those sections, as we have already seen, there was no survey, approved or even unapproved, until 1891—long after the creation of the reservation. Our position as to those townships has been indicated: That under the *Morrison* decision and those there cited, the State has never acquired any vested title—not even the naked fee. Consequently the State has no title, clouded or unclouded; no right of possession; no interest in the timber—nothing that it may be heard to assert in this court.

But if the plaintiff has a naked title, without the right of present occupation or enjoyment, akin to that of a remainderman, for instance, still we say that it is not entitled to the injunction sought in this suit, on grounds independent of title.

Plaintiff may not interfere unless the Indians are committing *waste* to its detriment. We are convinced that the evidence adduced clearly shows that waste is neither being committed nor threatened.

In paragraph 35 of the bill (Transcript, p. 24) plaintiff avers that the sections 16 are completely covered with valuable timber in a thrifty condition, young and growing and increasing in value each year, and that it is not necessary to cut it to preserve the same. In paragraph 42, it is averred that the timber upon these sections is largely "strong growing timber," which good husbandry demands should stand and increase in value to the benefit of the owners. In paragraphs 39 and 40, it is alleged that the Indians have threatened to cut all the timber and that they have actually cut great quantities of young, thrifty timber.

The allegations are denied in the answer and the evidence supports the defendant's contention.

The operations sought to be enjoined are authorized by the act of March 28, 1908 (35 Stat. 51). The defendant is thereby authorized to cause to be cut and manufactured into lumber "the dead and down timber, and such fully matured and ripened green timber as the forestry service shall designate." The Menominee fund is charged with the expenses of operations "including those for the protection, preservation, and harvest of the forest."

The cutting is done under rules and regulations prescribed by the Secretary of the Interior under authority of this act (Transcript, p. 110).

The cutting has been confined to only such timber as the Forest Service has designated (Transcript, p. 111). The cutting has been in the interests of good forestry (Transcript, p. 111). Such cutting has

been done with view of the preservation of the forest (*Id.*). No thrifty timber has been cut save where to leave it would mean loss (*Id.*). The cutting has not been prejudicial to the future value of timber (Transcript, p. 112). The cutting has been of fully matured, or dead and down, or ripened green timber with a view of maintaining a perpetual forest and allowing timber to reach maturity so that it can be cut for timber (*Id.*). The removal of such timber passing the age of maturity and going to decay saves the young timber and gives it a chance to reach light and air; whereas, leaving it, leaves the young timber in the dark so that it will not reach maturity (*Id.*). In the section 16 on which cutting has been done (T. 29, R. 14), the kind of trees that were taken were overmatured, full of worms, and were decaying—with the exception of 10 live green trees (Transcript, p. 114). In the system of reforestation employed, so far as pine timber is concerned, these should be in years to come a greater quantity than now exists there (*Id.*). Care is exercised in felling trees so that the young forest is saved as much as possible, conserving natural reproduction of the forest. Aside from this, a nursery is being operated, in which young trees are raised and transplanted to the cut area or to districts over which fires have gone. Thousands of plants are purchased and transplanted (Transcript, p. 118). If the timber were not cared for in this manner, but was left alone (which seems to be the purpose of the injunction sought by plaintiff), the forest, through the elements and fire, would entirely

disappear. The present system conserves the forest and maintains its value (Transcript, p. 119). A little pine has been cut on Sec. 16, T. 29, R. 14—about 10 trees that were live and green. In the system of reforestation in vogue, in time there should be a greater quantity than now exists (Transcript, p. 114). On that section, a little over 5 acres of land was cleared clean, for camp and railroad purposes (Transcript, p. 177). Aside from trees cut for the purpose of such clearing, the cutting of timber on that section, the evidence shows (Transcript, p. 181), was of trees from 154 to 224 years old, fully matured and from 12 to 25 inches in diameter.

It will not be forgotten that we are not dealing with a tenancy, whatever may be its nature in law, dependent upon the length of a human life. The duration of the occupancy to which these lands are subject is the lifetime not of an individual but of a tribe, a nation which is increasing in members (Transcript, p. 119). The theory on which waste may be enjoined by a remainderman is inapplicable here. A tract deforested will not regrow within the span of life allotted to the human being. But before the remainderman, if there be one in this case, may take possession, these tracts may produce and reproduce forests to be harvested. Good husbandry demands such cutting as has been made and will be made. Left alone, the forest will deteriorate. The State and the grantees may not touch the timber under the *Wisconsin* decision. Is it then to be left to loss by the insidious process of nature, hastened,

it may be, by some sudden elemental force? The testimony in the case is to the effect that there will be loss unless the judicious cutting of timber continues.

Waste means a lasting injury to the freehold; a permanent loss to the ultimate owner; a destruction or lessening of value of the property into which the remainderman will sometime come. The commission of waste, present or prospective, we submit, has not been proven by the plaintiff. On the contrary, the evidence shows that the timber resources of these tracts are being conserved, whoever the ultimate owner may be. This was not so in *U. S. v. Cook* (19 Wall. 591). The Indians were cutting not only without permission but without regard to the principles of good forestry. Here the cutting is authorized by Congress, provided it shall be done along the lines of scientific husbandry, and the evidence shows no departure from those lines. The Indians are cutting within the law; the cutting, we maintain, is a lawful cutting (unlike the situation in the *Cook* case); and the timber thus removed belongs to them from whatever standpoint the title to the land is viewed.

CONCLUSION.

We contend:

I. That the State never acquired a vested title in any section 16 in this reservation, because (a) at no time from the date of the grant of school sections to the State has the land been unoccupied, public land of the United States, but at all times has been subject to the occupation of the Menominee Indians,

and thus "otherwise disposed of" within the meaning of the grant; and because (b) a State can acquire no vested title in a school section until there has been identification by survey, duly approved, of land which, at the time, is "public land" "not otherwise disposed of"—and the evidence shows an actual occupation of those lands by the Indians prior to, and at the time of, survey.

II. If the foregoing is not the law, then that the State could not become vested with the fee in any sections formally set aside to these Indians by the treaty of 1854, unless such sections were identified by an approved survey prior to August 2, 1854.

III. That as to any sections not so surveyed prior to August 2, 1854, the State, by its joint resolution passed before any approved survey thereof, assenting to the Indian occupancy of the townships including such sections, is estopped now to assert a title adverse to that of the United States and the Menominee Indians.

IV. That if, however, under all the circumstances of the case, the State has an inchoate right to those sections, it is not a title to the naked fee, subject to the occupation right of the Indians, but merely a right, now in suspension, to take the fee and the possession upon, and not until, the extinction of the Indians' right.

V. That at the most the State might have taken the naked fee subject to the Indians' occupancy right; that in this event, its rights would be merely those of a remainderman; but that no waste is shown, present

or prospective, and, for that reason, there is no occasion for an injunction to interfere with proceedings under the act of March 28, 1908.

VI. That, in any event, the evidence shows that the State has no title to or interest in any section 16, entitling it to maintain this suit under the act of March 2, 1901 (31 Stat. 950), except as to its claim to the two sections in Ts. 28 and 29, R. 15.

Wherefore, renewing our motion to dismiss (overruled without prejudice), we respectfully submit that we are entitled to a decree dismissing the plaintiff's bill and to a judgment for costs.

CHARLES D. MAHAFFIE,

Solicitor.

C. EDWARD WRIGHT,

Assistant Attorney.





Office Supreme Court, U. S.
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CLERK.

Original No. 107

In the Supreme Court of the United States

October Term, 1913

STATE OF WISCONSIN,

vs.

FRANKLIN K. LANE,
Secretary of the Interior.

} In Equity.

BRIEF AND ARGUMENT IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS THE ORIGINAL BILL OF COMPLAINT

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Supreme Court of the United States

October Term, 1913

Original No. 10.

STATE OF WISCONSIN,

vs.

FRANKLIN K. LANE,

Secretary of the Interior.

In Equity.

BRIEF AND ARGUMENT FOR COMPLAINANT

This is an action in equity brought by the State of Wisconsin, conformably to Act of Congress, March 2, 1901, and Chapter 95 of the Laws of 1903, of the State of Wisconsin, to quiet the title of the State and its grantees and to enjoin the Secretary of the Interior of the United States from cutting the timber upon Sections 16, within the limits of the present Menominee Indian Reservation, situated in the State of Wisconsin, more particularly described as: Townships 28, 29 and 30 of Ranges 13, 14, 15 and 16, excepting Sections 16 in Township 28, Ranges 13 and 14. The latter two townships are not in controversy here, for the reason that the same at one time constituted a part of the Stockbridge Reservation and afterwards an Act of the United States all but 18 sections of it were disposed of and no longer constituted any part of a reservation. The remaining 18 sections of the Stockbridge Reservation have since been patented to the Stockbridge Indians.

The defendant in this action filed a motion to dismiss the complaint upon various grounds, which motion was denied by

this court. Thereafter the defendant duly filed an answer, to which the complainants filed a replication.

Thereafter a Commissioner was appointed to take the testimony and the case is now before this court upon its merits. A careful reading of the testimony shows conclusively that but three allegations of the complaint are in effect attempted to be controverted. All other facts are practically undisputed in accordance with the allegations of the complaint. There are but three questions of fact in the case alleged in the complaint, which the defendant attempts to deny. They may be stated as follows:

1—The complainant claims that an order of removal was made in accordance with Article 7 of the Treaty with the Menominee Indians of 1848. This the defendant denies.

2—The complainant claims that on October 18, 1850, the Menominee Indians did not occupy any part of the present reservation. This the defendant denies.

3—The complainant claims that the defendant has started to cut the timber on these school sections involved in this section, and claims the right to cut all of the same, and denies any right whatever of the complainants in and to said Sections. This the defendant denies in part.

Before discussing the law applicable to the facts involved in this action, it is important to determine just what those facts are, and the evidence sustaining the allegations of the complaint will now be called to the court's attention.

1—ORDER OF REMOVAL

It is admitted by all the parties to this action that the original order of President Millard Fillmore notifying these Indians to remove in accordance with Article 7 of the Treaty of 1848 cannot now be found in the files. The complainant claims, however, that such an order was in fact made, and is lost. The defendant's contention is that not being in the files

it is sufficiently shown that it never was made. In order to establish the fact that such an order in fact was made, we call the court's attention to the following evidence, to-wit: Defendant's Exhibit A offered in evidence, as appears from Case Page 224, Record Page 374, which purports to be a petition of the Menominee Indians directed to the President of the United States concerning the removal, which was about to occur on October 18th, 1850. This petition was sent to the President about September 1st, 1850. The following portion of that Exhibit relates specifically to the question of whether the President had ordered the Menominees to comply with Article 7 of their treaty and remove from the land:

"By the 7th Article they were permitted to remain on the land ceded by said treaty, and at their present homes during the period of two years from the date of said treaty, or until the 18th day of October, 1850, and until the President shall notify them that the same are wanted.

They have already been notified that the United States will expect them to remove to the new home set apart for them in this treaty, according to the terms of said 7th article, that is by the 18th of the approaching month of October."

Again, out of Exhibit "A" on page 225 of Case, 375 of Record:

"They have but little doubt that they would be subjected to great suffering if they were forced to occupy it,—and, especially if they were required to remove to it, by the time fixed by the said treaty. They, therefore, pray their Great Father, that he will countermand the order for their removal during the present Fall, and that the matter may be left open for future consideration."

— 4 —

The court's attention is invited to Exhibit B of the complaint, which is an order of President Millard Fillmore under date of September 5th, 1850, which reads as follows:

"Washington, Sept. 5, 1850.

To the Secretary of the Interior;

SIR: After careful consideration of the application by the Menominee Indians, to be permitted to remain temporarily upon the lands in Wisconsin ceded by them to the United States by treaty bearing date October 18, 1848, I perceive no objection to granting their request for a reasonable time; you will therefore inform them that they will be permitted to remain there until the 1st day of June next, provided they do not interfere with any surveys which may be ordered, and they must not understand this as granting any indulgence beyond that time.

Your ob't Serv't.

(Signed) Millard Fillmore."

This Exhibit is offered in evidence, and may be found on Page 273 of Case, 461 of Record.

The court's attention is also invited to Exhibit "I" of the complaint, which reads as follows:

"Department of the Interior,

Office Indian Affairs.

May 28th, 1851.

Sir: I have the honor to enclose copy of a letter from R. W. Thompson, Esqr., Attorney for the Menominees, requesting in their behalf permission for them to remain one year longer in the country they now occupy.

The time limited by the President for the removal of these Indians will expire on the first day of June ensuing, and as weighty reasons exist why they should not be removed at that time, I recommend that an order be issued by the President permitting them to re-

main until the 1st day of June, 1852,—on the condition that they do not interfere with the Serveys and with the distinct understanding that this extension of time is an act of favor, and that they are still subject to removal at the discretion of the President.

Very respectfully,

Your Obed't Serv't,

L. L. E. A. Commissioner."

Hon. A. H. H. Stuart, Sec. of the Interior.

O. I. A.—Green Bay.

Comr. Indian Affairs, May 28th, 1851.

Enclosing copy of a letter from R. W. Thompson, Esq. Att'y for Menominees, requesting in their behalf, permission for them to remain one year longer in the country they now occupy.

Comr. also recommends that an order issued by the President permitting them to remain until the 1st day of June, 1852, etc.

Recommended to the President for his approval.

ALEX H. H. STUART.

May 29-51

Approved, May 29, 1851. File.

Millard Fillmore.

(Over)

Rec'd. at Ind. Office May 30, 1851."

This Exhibit was offered in evidence and may be found on page 40 of printed case, 58 of record.

The court's attention is also invited to Exhibit "J" of the complaint, which reads as follows:

"Department of the Interior.

Office Indian Affairs.

June 1st, 1852.

Sir: I have received a letter from R. W. Thompson, Esq., Attorney for the Menominee Indians, urging that the time for their removal be extended by the President until the 1st day of October next. The present un-

settled condition of the business of these Indians, renders the extension necessary, and I therefore recommend that an order to that effect be immediately made.

Very respectfully,

Yours Ob't Serv't,

L. LEA, Commissioner.

Hon. Alex H. H. Stuart, Secretary of the Interior.

Ordered according to the recommendation. June 2d, 1852.

MILLARD FILLMORE

Commr. Indian Affairs. June 1, 1852. Has rec'd a letter from R. W. Thompson, Esq., Attorney for Menominee Indians, urging that the time for their removal be extended to 1st October next.

Recommends that an order to that effect be immediately made.

Returned to the Com'r approved by the President—
(This word is illegible.)

June 3d, 1852.

Rec'd June 2d, 1852."

This Exhibit was offered in evidence and may be found on pages 275 and 276 of Case, and 467-8-9-and 470 of Record.

The court's attention is also invited to a letter from Orlando Brown to Hon. I. D. Doty, House of Representatives found on page 267 of Case 451 of Record. The part referred to reads as follows:

"In reply I have the honor to inform you that the department is satisfied that the treaty with the Menominees of October 18th, 1848, was fairly made, and that the amount stipulated and which they agreed to receive for the compensation of their lands in Wisconsin was a fair consideration therefore. That treaty is the law of the land and must be carried out according to its provisions * * * * The land on Lake Pepin desired by the Memorialists for a residence, does not as yet belong to the United States, but to the Sioux Indians; and

when purchased cannot be assigned to the Menomines or any portion of them, or to any other Indians, as it is required for our own population. It would also be contrary to the treaty, as well as to the policy of the government, to permit any portion of the Menomones to remain in Wisconsin, their removal is necessary to free them from the embarrassments and evil influences under which they have for some time been suffering."

The court is referred to the letter from Orlando Brown, Commissioner of Indian Affairs to W. A. C. Bruce, sub-agent Green Bay, under date of August 27, 1849, and especially that portion which reads as follows, found on pages 261, 262 and 263 of printed case, and pages 440, 441, 442, 443 and 444 of Record, to wit, found on page 262:

"They must be given clearly to understand, that the government will not be trifled with and treated with disrespect, and that they must, in good faith, prepare themselves to comply honorably with their treaty obligations, or they will be compelled to do so, and not only this, but that not another Dollar of money will be paid them while they remain **where they are** and behave as they have done beyond the \$30,000 under the first clause of the fourth article of the treaty; and that would be withheld so long as they did not manifest a proper spirit of compliance with their obligations, if that instrument did not require it to be paid as soon as convenient after being appropriated by Congress. If, therefore, they wish to receive their moneys next year and not to be compelled to remove by Military force, without getting them immediately after the expiration of the two years they stipulated in the treaty for them to remain where they are, they will at once change their conduct, listen to the advice of the agents of the government, and without delay, and in good faith, send off the exploring party to examine their new country."

Extracts from report of Hon. L. Lea, Commissioner of Indian Affairs, dated November 27th, 1850, to the Secretary of the Interior, found on page 247, of printed case, 417 of record:

"It was expected that the Menominees for whom a location has been provided between the Winnebagoes and Chippewas would be removed this year: but before the exploration of their new country by a part of these Indians had been completed, the season was too far advanced for the Tribe to emigrate before the approach of winter. The President, therefore, in a just spirit of humanity gave them permission to remain in Wisconsin until the first day of June next."

Again, extracts from the report of Alex Ramsey to Hon. Luke Lea, found on page 248 of case, 417 of record, under date of October 21st, 1850, as follows:

"The Menominees (Wild race) Indians have not yet removed to their lands in this territory, although the term of their stay in Wisconsin under the Treaty of 1846 expired during the present month."

Extracts from report of Hon. L. Lea to the Secretary of the Interior under date of November 27, 1851, found on page 248 of Case, 418 of Record:

"By permission of the President, the Menominees still remain on the lands in Wisconsin ceded by them under the provisions of their treaty of 1848 with the United States. In that treaty it was stipulated that they were permitted to remain two years from the date thereof, and until they were notified by the President that the lands were wanted by the Government * * * * The fall of last year was the period fixed upon for their removal; but owing to the urgent appeals, and those of many of the whites in their immediate vicinity, and in consideration of their peaceful habits, the President granted them permission to remain until the first of

June of the present year. At the expiration of this last named period, it being known that they had made no arrangements, and were in no condition to emigrate, the President again, at their earnest solicitation, consented that they might remain a twelfth month longer, on condition, however, that they should not interfere with the public surveys, and with a distinct understanding that this extension of time was to be considered an act of favor, they being still subject to removal at his discretion, and of this, Superintendent Murray was instructed to take care that they should be fully advised."

This evidence is overwhelming in showing that the order for the removal of the Indians in accordance with Article 7 was in fact given. In fact other exhibits in the printed case show that the Government contemplated the actual removal by military force. We contend that this court should find as a finding of fact upon the evidence submitted, that the Indians were in fact ordered to remove in accordance with Article 7 of the treaty of 1848.

In this connection we call the court's attention to the fact that the extensions granted by President Fillmore expired in October, 1852. Between the time of the first extension and the last the Indians had explored the Minnesota reservation and reported adversely, and it was then that a northern location was explored for them to remain upon temporarily, and that in October and November, 1852 they were removed to a part of the present reservation. Ranges 13 and 14 of towns 28, 29 and 30 included in the present reservation were not included in the tract upon which they were permitted to reside temporarily in October 1852. This will be brought out more plainly in a subsequent part of this brief.

2—NON-OCCUPANCY ON OCTOBER 18, 1850.

There is no question but what the Menominee Indians at one time claimed to own all of the territory within the present

reservation. They did not, however, occupy all of this territory, and as early as 1831, in the treaty with the Menominee Indians, we find the following language used in Article 4:

"The following described tract of land, at present owned and occupied by the Menominee Indians shall be set apart and designated for their future homes, upon which their improvements as an agricultural people are to be made."

Here follows the description of the premises, which does not include any part of the present reservation.

It is apparent also that this provision of this treaty was in fact carried out, because in October 1852, being at the expiration of the last extension for their removal, they were in fact removed to the present reservation. It is apparent also from the evidence, which we will submit in support of this contention, that the Indians knew nothing concerning the present reservation, and had not been upon it, and in fact explored it in connection with an exploring party of the sub-agent of the Green Bay agency shortly before their removal in October, 1852. The evidence to be submitted shows further that the outlines of the reservation to which they were removed was actually staked out on the ground and designated by monuments, and that the official records show the boundaries to be as follows to-wit: Commencing at the South East corner of Town 28, Range 19 East, thence West 30 miles, thence North 18 miles; thence East 30 miles; thence South 18 miles to the place of beginning.

Our contention is that this was a new territory that they did not in fact occupy in 1850, and to which they were removed in October, 1852. In a subsequent part of this brief we will take up the abandonment of the Menominee Indians of ranges 13 and 14, towns 28, 29 and 30.

The government actually paid for the removal of the Menominee Indians from their homes, being within the territory described in Article 4 of the treaty of 1831, and Messrs.

Thompson & Ewing obtained the contract for the service. The court's attention is called to the letter from E. Murray, Superintendent of Menominee Indians, dated November 2, 1852, to the Commissioner of Indian Affairs found on page 238 of Case, and 397 of record. This language is used:

"In conformity with my report dated Powwa-ha-con-na, the 16th ultimo, the Menominees commenced their emmigration on the 19th ultimo, and I have now the honor to report that they have been removed by Messrs Thompson and Ewing, in pursuance of their contract, to this place."

(Falls of Wolf River now known as Keshena Falls located in Town 28, Range 15, Shawano County, Wisconsin.)

Again, in the same exhibit, this language is used:

"In obedience to your instructions I have diligently superintended the removal, and am happy to certify that it has been effected in a peaceful, comfortable and satisfactory manner. They have been abundantly supplied with transportation and good and wholesome provisions. No complaint has been made to me and no instance of discontent has been noticed by me. On the contrary the Indians expressed their entire satisfaction in regard to their removal, and have this day, in council presented their thanks to the contractors for their kindness in providing to make their journey smooth and comfortable. They are now encamped on their new home and appear to be highly satisfied with the territory selected for them."

The court's attention is called to the report of the Commissioner of Indian Affairs to the Secretary of the Interior, dated November 30th, 1852. The portion referred to reads as follows, as found on page 240 of Case, 401 of Record:

"The removal of the Menominees, as contemplated by an act of Congress passed at the last session, has been satisfactorily effected. The whole tribe are now concentrated on the designated territory between the Wolf and Oconto rivers—a location—which they are well pleased, and where they are anxious to be permitted permanently to remain. Should this be assented to by the legislature of Wisconsin, the arrangements necessary to effect the object can be easily made on terms, it is believed, mutually advantageous to the Indians and to the government. The country where they are now located is well suited to their wants, and I know of none to which they could with propriety be removed, and where they would, at the same time, be so little in the way of our white population. Whenever they may be settled, it will be incumbent on Congress to make further provisions for them, as their claims appeal strongly to the justice and humanity of the government."

Your attention is also called to letter of September, 1853, from John V. Snyder, being a part of the report of the Commissioner of Indian Affairs found on page 240, and 241 of Case and 402 and 403 of record. In this report this language is used:

"The Menominees were removed to their present territory in November of last year (1852) * * * * The Menominee tract is divided nearly equally into two parts, which are separated from North and South by Oconto River. These two divisions are very distinctly marked, that on—east being heavily timbered with pine and maple in about equal proportion, the pine being the very best quality for lumbering purposes, and the maple affording extensive facilities for manufacturing sugar, and the land also being of the best quality for farming, while that portion on the West is a succession of dry sandy ridges, unfit for cultivation, and

only thinly timbered with oak and spruce, with the exception of some narrow pine groves and sugar maple bottoms bordering the Wolf River on the extreme West boundary of the tract."

Again on page 242 we find this language:

"Having been broken up by their recent removal the agricultural bands are nearly destitute of everything necessary to carry on their operation."

The records of the Indian Office are filled with reports concerning explorations of the Menominee Indians. In order so that the testimony about to be quoted will be fully understood, we wish to call the court's attention to the fact that two explorations were made by the Menominee Indians between the dates of September 5th, 1850 and October 18th, 1852. One of the explorations was of the territory in Minnesota, which was contemplated to be the future home of the Menominees. This one was undertaken by Col. Childs. The other exploration to the present reservation, excepting ranges 13 and 14, towns 28, 29 and 30 was undertaken by Elias Murray. In July 1851, he set out to explore a northern location, and we quote extensively from that report, which is found on page 274 of Case. 464 of Record, showing that the Menominees did not in fact occupy the present reservation at that time:

"Sept. 30, 1851.

"Hon L. Lea, Comr. of Indian Affairs.

Sir: In obedience to instructions I set out in July last to explore a Northern location for the Menominee Indians, but a requisition to aid in collecting the Potawatomie Indians, called me away from this duty. I have the Honor to report that I have this date returned from exploring the country on the Wolf and Oconto Rivers.

I commenced at the South West corner of Township 28, on the Range line between 19 and 20, and run West

(by calculation) 30 miles—then North 18 miles—thence East 30 miles—thence South 18 miles to the place of beginning. These lines embrace the Wolf and Oconto Rivers, and will conform to the Public Surveys, leaving no fractions.

I find the country generally to be a dry sandy soil covered with low scrubby pines, and occasionally a swamp of tamarack and cedar. There is a small portion of good land for agriculture, and a few sugar camps. There are a great many small lakes abounding with fish and wild fowl, and bear, foxes and martins appear to inhabit these swamps.

The deer are numerous on the plains. There is also some good pine timber.

I consider the country of little value for a White Settlement, but well adapted to the Menominee Indians. A portion of those are inclined to cultivate the soil for their support and sufficient quantity of pretty good land will be found for their use. The game and fish will sustain the hunters.

I am inclined to think they may all be persuaded eventually to seek subsistence from Agriculture.

At the special request of the Chiefs, I took three of them to wit: No Motte, Wau ke chi ou and Oshk ke nash new with me. As there were no roads, I also was obliged to hire a boat and its owner and four men to row. One man with a light canoe to hunt and a man to cook. Those with the Chiefs, interpreters and myself made a party of twelve. Our voyage was by water about 180 miles above the mouth of the Wolf where it intersects Fox River, as the boatmen who follow lumbering calculate the distance. The line on the South side of the tract above described cross the Wolf River about four miles below the great falls at which point there is a good saw mill with two saws and excellent fixtures, cutting 12,000 feet of lumber per day. The logs are cut from public land above the mills and rafted down. I should think there were now 3,000 logs in the

dam. The mill is built on a rock foundation, and the owners are willing to sell it to the Indians. My interview with them was perfectly amicable.

Having to explore on foot (there being no horses there) I entrusted the exploration in the rear of Wolf River on the East side, to the very sensible, capable and trust-worthy Interpreter, Mr. William Powell, whose report I herewith enclose. I also solicit the Department to make him some reasonable allowance for his personal services on the discharge of this arduous duty. To comply with instructions to a punctilio. I yesterday morning left the boat 150 miles above this, and came through the wilderness with a Guide. The boat could not arrive here before the 3d or 4th of October. My instructions were to report by first of October, which, by exertion, I now do.

The Indians are highly satisfied with the location I have recommended. They are very civil and appear peaceful and amicable in their disposition."

The court's attention is further invited to the letter to the President of the United States, by the Indian Chief of the Menominee Tribe, which letter is found on page 276 of the Case, 471 of the Record. The following quotation from that letter shows the situation:

"To Our Great Father, The President of the United States:

We, the Chiefs, headmen of the Menominee nation of Indians, thank our great father, because he has thought of us when we were so far off. He has heard our voice, and has kept us from being sent to the Crow Wing River, and our hearts are made glad. We are now at our new homes on the Wolf and Oconto Rivers, and we feel happy. We will try and learn our young men to work the land, that they may raise provisions for our families. We will try and obey our great father's voice, in all things, because we know he is our friend.

We have just been removed from our old homes and everything has been done to our satisfaction."

The court's attention is also called to the survey of Charles Tuller, being page 280 of Case, and 477 of Record. This survey and the accompanying letters in regard thereto, found on Page 281 of Case, and pages 478, 479 and 480 of Record, show that the Menominee Indians shortly after their removal to their new home marked their reservation by monuments, as shown by the survey, and abandoned everything outside of that proposed reservation. The court's attention is especially invited to this latter argument, because of the fact that we take the position that ranges 13 and 14, towns 28, 29 and 30 occupy a different position than the other lands within the Menominee Reservation, and were clearly abandoned by positive action on the part of the Menominee Indians. In fact more so than the Stockbridges abandoned the township and a half in towns 28, Ranges 13 and 14.

We will not take up the court's time in further demonstrating that testimony is practically conclusive that the allegations of the complaint to the effect that the Menominee Indians did not occupy the present reservation, is true. In fact the countless exhibits offered in evidence bear silent witness to the fact that the piece of land to which Thompson and Ewing removed these Indians on October 19, 1852 was to them unoccupied territory. There is not a scintilla of evidence in this case worthy of consideration that there was upon this tract of land a single farm, or a school house. In fact the testimony is overwhelming that the first Indian came upon this tract of land in October 1852.

We respectfully ask that as to this disputed question of fact, that the court find with the complainant to-wit: That this territory was not occupied by the Menominee Indians on October 18th, 1850.

3—CUTTING OF TIMBER

The answer denies this allegation but the evidence is practically conclusive that that allegation is true. Mr. A. S. Nicholson, the superintendent of Indian Affairs upon this reservation testified on page 107 of Case, 173 of Record, as follows:

“Q. In building your logging camps upon that section you intended to make that same use of the timber that you cut upon that section?

A. Yes, sir.

Q. The lands that were cut on Section 16-29-14 has not been followed by any agriculture, there are no farms upon that piece?

A. I am not quite sure but what there is one.

Q. On Section 16-29-14?

A. There is one on or either quite close to that.

Q. But no clearing has followed the cutting you did there?

A. No, sir.

Q. In all the cutting you have done on the reservation you have discouraged agriculture upon the cutting of the lands?

A. Yes, sir.

On Page 108 of Case, 174 of Record:

Q. After you were notified by the attorneys for Hayter and Humphrey, then you gave the matter consideration and asserted the government had full right to both the lands and timber upon that section?

A. That was my opinion.

Q. You would go and recognize no right of the grantees of the state, that they had no right to interfere with you, wasn't that your position?

A. In substance.

Q. Didn't you in fact put the logging camps on sec-

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tion 16-29-14 and threaten to cut all the timber to compel us to bring this suit?

A. I can't answer it the way you put it. That entered in part. The railroad had to go through that land to bring in some timber that lay North east of there; that was in 1910-11 when the camp was being established and why it was put on Section 16 to cut that timber.

Q. One of the reasons it was put there was to try out that question and make us stop cutting, by suit, if necessary?

A. That might be so construed, yes.

Q. Isn't that true, that that was the claim you made to the Department as a reason for putting these camps on Section 16?

A. No, that was not claimed to the department, but was on my mind.

Q. To get the question settled?

A. Yes, sir.

Q. Didn't you in your report to Mr. Ayer, state to him that you put those camps on there for the purpose of compelling the grantees from the state to go into court?

A. If I saw the report I could answer it.

Q. I refresh your memory to a part of the report of Mr. Ayer reported in a hearing before a Joint Committee of the Congress of the United States investigating Indian affairs, 63rd Congress, No. 8 in which this language is used, "I started camp No. 15, on section 16 and prepared to cut well knowing that these lumber interests outside would be compelled to go into Court to stop it or yield up their claims", is that the report you made to Mr. Ayer?

A. That is about the burden of it.

The testimony of Mr. Nicholson shows clearly that 200 million feet of logs have been cut from this reservation, and sold in the markets of the world. It also shows that the fully matured timber and blow-down has been taken from lands not in-

cluded in the 16 section, and that he intended to cut the sixteenth section of 29-14, and take the timber to their mill and sell it in the markets, the same as the timber that came from their other lands.

The testimony of Len Dodge, on page 135 of Case, 220 of Record, of Charles Tourtilott, on page 132 of Case, Record 215, and of Silas Pendleton, on page 130 of Case, and 213 of Record show pretty plainly that notwithstanding the claims made by Mr. Nicholson to the contrary that the logging done upon that reservation was cut cleaner than the ordinary white logger cuts his timber. This was true of all the cutting done on 16-29-14, as well as the adjoining lands, which were cut over and which these three witnesses had occasion to see. It is apparent that the logging that Mr. Nicholson was doing and threatening to do upon this reservation and especially upon Section 16-29-14 was the taking of all the merchantable timber, young, as well as old.

We believe that this allegation of the complaint has been proven, and that it is apparent that Mr. Nicholson threatened to cut all the timber on Section 16-29-14, and claimed that the grantees of the state had no interest whatever in and to said section.

It also appears that Mr. Nicholson did cut from this particular land approximately 160,000 feet of timber, and this amount from approximately 5½ acres of land. (C. 182 R. 300).

We also wish to call the court's attention to Mr. Nicholson's testimony on page 176 of Case, 291 of Record:

"Q. You know the value of cut over lands similar to the ones on section 16-29-14 in that community, do you not?

A. I do.

Q. What do you figure the lands on Section 16-29-14 will be worth after the cutting of the timber, per acre?

A. An average of \$10 per acre.

We think it apparent from this testimony that the defendant through his agent, Nicholson, would have cut all the timber on Section 16-29-14 and actually claim to own all of it, and threatened to exclude the plaintiffs therefrom, and if it had not been for an arrangement between the Commissioner of Indian Affairs and the complainant, whereby cutting was to be postponed until this suit was terminated, that all the timber would now be cut, and the lands be worth a few dollars per acre. From the testimony it is undisputed that these lands are heavily timbered, and that after the timber is cut they will be of little value. We believe that the allegation of our complaint with reference to the threatened cutting and claim of the defendant is abundantly established by the evidence, and we ask the court to find such as a finding of fact.

With these three Findings of Fact settled in accordance with the claim of the complainant, and the other undisputed things that appear, we feel that the complainant is entitled to the relief asked for in the complaint, viz: That the defendants be restrained from further cutting upon these lands, or in any way interfering with the exercise by this complainant of acts of ownership over said lands.

BRIEF ON THE LAW

It appears that in and by section 7 of an Act of Congress of the United States to enable the people of Wisconsin territory to form a constitution and state government and for the admission of such state into the union, approved August 6th, 1846, it was enacted as follows: Section 7:

"And be it further enacted that the following propositions are hereby submitted to the convention which shall assemble for the purpose of forming a constitution for the State of Wisconsin for acceptance or rejection; and if accepted by said convention and ratified by an article in said constitution, they shall be obligatory on the United States.

Section 1. That section numbered 16 in every township of the public lands in said state, and where such section has been sold or otherwise disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted to said State for the use of schools."

That on February 1, 1848, the constitutional convention of the people of said territory, duly called in accordance with said enabling act of congress, adopted as constitution which was thereafter duly ratified by vote of the people of said territory on the 2nd day of March, 1848, in accordance with the provisions of the enabling act aforesaid and the provisions of said constitution.

This constitution in Section 2 of Article 2 adopted ratified and confirmed the provisions of Section 7, herein before set out.

Following the adoption of said constitution, the said State of Wisconsin, by an Act of Congress of the United States, approved May 29, 1848, was duly admitted into the union on equal footing with the original states in all respects whatsoever.

It appears that prior to July 9, 1832, the Menominee tribe of Indians occupied a small parcel of land situated in the State of Wisconsin, upon the shores of Lake Winnebago, but claimed as their country two large tracts of land situated in the State, to-wit: One on the East side of Green Bay, Fox Lake and Winnebago Lake as far South as Milwaukee River and as far East as Lake Michigan. The other on the West side of Fox River, described as follows:

Beginning at the mouth of Fox River: thence down the East shore of Green Bay and across its mouth so as to include all the highlands of the Grand Traverse; thence westerly on the highlands between Lake Superior and Green Bay, to the upper forks of the Menominee River; thence to the Plover Portage of the Wisconsin River; thence up the Wisconsin River to the

Soft Maple River; thence to the source of the Soft Maple River; thence West to the Plume River, which falls into the Chippewa River; thence down said Plume River to its mouth; thence down the Chippewa River 30 miles; then Easterly to the Forks of the Manoy River, which falls into the Wisconsin River; thence down the said Manoy River to its mouth; then down the Wisconsin River to the Wisconsin Portage; thence across the said portage to the Fox River; thence down the Fox River to its mouth at Green Bay or place of beginning.

The country on the East side of Fox River, Winnebago Lake as far South as Milwaukee River was duly ceded to the United States absolutely by the treaty of 1831, proclaimed July 8, 1832.

That by virtue of said treaty a certain tract of land was set apart for the New York Indians, described as follows, to-wit:

"Beginning on the West side of Fox River near the "Little Kackalin" at a point known as the "Old Mill Dam;" thence North West 40 miles; thence North East to Oconto Creek, falling into Green Bay and Fox River to the place of beginning."

The above tract set out for the New York Indians is hereby given in detail for the reason that it is claimed in the complaint that Sections 16, in Range 16 in Townships 28, 29 and 30 were absolutely ceded by the Menominee Indians to the United States by the Treaty of 1836, proclaimed February 15th, 1837. In this treaty the grant to the New York Indians herein set out is referred to and identifies the country ceded by the latter treaty.

It is shown that in 1848 the Menominee Indians entered into a treaty wherein and whereby the said Indians in Article 2 of said treaty provided as follows:

"Section 2—The said Menominee tribe of Indians

agree to cede, and do hereby cede, sell and relinquish to the United States, all their lands in the State of Wisconsin, wherever situated."

Article 8 of said treaty reads as follows:

"It is agreed that the said Indians shall be permitted, if they desire to do so, to remain on the lands hereby ceded, for and during the period of two years from the date hereof, and until the President shall notify them that the same are wanted."

It is undisputed that the township lines of this reservation were duly surveyed by the United States in 1851 and 1852, and that the section lines of said tract of land were run by the United States in September, 1853, and June and July, 1854. Every section but two which is the subject of this controversy was identified by survey prior to the ratification of the Treaty of 1854, and many of them were identified by survey in September, 1853. Four were approved by Surveyor General before May 1854.

It appears that the Menominee Indians were given in exchange for their lands in Wisconsin a certain country in Minnesota and large payments in cash. It further appears that the Menominee Indians, after examination of the Minnesota territory, and after being notified and ordered to remove from their Wisconsin lands by the President of the United States, petitioned the President of the United States to allow them to remain temporarily in Wisconsin.

President Fillmore by an executive order notified these Indians to remove in accordance with the terms of the treaty and notified them that the lands were wanted in accordance herewith. Thereupon the Indians petitioned the President of the United States to permit them to remain temporarily. See complaint, Exhibit "A". In this petition this language is used:

"They have already been notified that the United States will expect them to remove to the new home set apart for them in this, according to the terms of said 7th article—that is, by the 18th of the approaching month of October."

At this time, which was in September, 1850, the Menominee Indians occupied the land immediately to the West of the land described as the Agricultural land, which was set out in the Treaty of 1831, and did not occupy any part of the present reservation.

On September 5th, 1850, President Filmore signed an executive order, marked Exhibit "B", in the complaint, permitting the Indians to remain temporarily until June 1, 1851, with the distinct understanding that they do not interfere with any surveys which may be ordered, and that they must not understand this order as granting indulgence beyond that time.

Thereafter the President again extended the time within which the Indians should remove to October 1st, 1852, in accordance with Exhibits "I" and "J" attached to the complaint. And in 1853 the Indians were permitted to remove themselves from their home around Lake Winnebago to lands on the Wolf River. It was provided that they were to remain temporarily and the State of Wisconsin by a resolution under date of February 1st, 1853, gave the assent of the state of Wisconsin to said temporary occupancy.

On August 2, 1854, the Treaty was concluded which gave to the Indians their present reservation described in this brief.

The State of Wisconsin has at all times claimed Sections 16 in each of these townships as its own property under the School Grant, and that it has exercised ownership thereover, has issued patents to various grantees for large sums of money and is still the owner of two of said sections.

It is also undisputed that many grantees of the State of Wisconsin resold for large sums of money and that the purchasers bought in good faith, relying upon the right of the

State of Wisconsin to give title, and of its grantees of again having the lawful right to transfer to them. That this belief was due in part to the many rulings of the land department, holding that the Indians had a mere right of occupancy and the State had the ultimate fee under its School Grant, and especially to the decision of the Supreme Court of the United States in the case of *Beecher vs. Wetherby*, 95 U. S. 517, and the decision of the land department, wherein Henry Sherry was paid for trespass committed by the Menominee Indians upon his lands, which was Section 16 of one of the Townships of this reservation.

It is undisputed that the State of Wisconsin has taxed these lands for many years and its grantees have paid these taxes to the State and County.

It also appears that the Menominee Indians have erected a large wood working plant and saw mill upon their Reservation, wherein lumber is manufactured for the markets of the world and that thirty million feet of lumber are annually cut and disposed of, and the money placed in the fund of the Menominee tribe of Indians, and that the said Indians claim and the said Secretary of the Interior claims that the state of Wisconsin and its grantees have no right or title of any kind to said Sections 16, and the said Indians have been directed to cut all the timber upon said Sections 16, which belonged to the State and its grantees, and to dispose of it in the markets. That the said Indians and Secretary of the Interior have actually entered upon one of said Sections and have cut valuable timber and threaten to cut all of it. That said timber is young, thrifty and growing, and that the cutting thereof will render the property remaining of little or no value. That the value of said real estate is largely in the standing timber. That said cutting by said Indians through the direction of the Secretary of the Interior is not for the purpose of improving the land thereafter, or of using the material for said Indians, but for the purpose of committing waste upon said property and deliberately defying the State of Wisconsin and the claims of its grantees.

It is alleged that unless this unlawful cutting is prohibited and the claim of the State and its grantees is established, irreparable injury will be done to the State and its grantees.

The whole case in a nutshell to be decided by this court is this:

Has the State of Wisconsin or its grantees any right which needs the protection of a court to Sections 16 in the present Menominee Indian Reservation, and does the complaint and the facts of which this court takes judicial notice, establish in the State and its grantees any cause of action against the defendant, who represents the Menominee tribe of Indians?

There seems to have been no dispute to the status of the Menominee Indians and their rights in Section 16 until the case of *Minnesota vs. Hitchcock* was reported, found in 185 U. S. 373. Until that time there was not a particle of doubt but what the most that the Indians could claim was the right of occupancy. It had been decided time and again by the land department, by opinions of the Attorney Generals, and by the Supreme Court of the United States, that on account of the peculiar situation upon this reservation, the Indians had at most a right of occupancy. After the case of *Minnesota vs. Hitchcock*, reported in 201 U. S., page 202, for the first time the claim was made that the State and its grantees had not title at all, and that the Indians could ruthlessly enter upon these lands and cut and destroy the timber.

Our position in this case is as follows:

We have one of three kinds of title.

First—The absolute fee.

Second—The ultimate fee subject to the Indians' right of occupancy.

Third—No title at all.

It never was disputed by the Indians but what we had at least title classed as number "two", until the *Hitchcock* cases

were reported. Our claim in this case is and the State has always claimed that we have the absolute title to all of Sections 16, and certainly to Sections 16 in this Reservation, which lie within the townships of Range 16. We contend that the Sections 16 in the Townships which lie within Range 16 had been absolutely ceded by the Menominee Indians in the Treaty of 1836. This brings us to the question as to what were the boundaries of the Menominee Indian Grant at that time, and just what land did the Indians cede at that time to the Government.

The upper forks of the Menominee River referred to in the Treaty of 1836 is as near as can now be located near Crystal Falls, which lies in Township 42, Range 17 East.

In order to ascertain clearly just what was ceded by the treaty of 1836 it is important to know just what the boundary line was as claimed by the Chippewas to the North. That boundary line is set out in the treaty with the Chippewas, which was proclaimed in 1837, as follows: "From the Plover Portage of the Wisconsin, on a Northeasterly course, to a point on Wolf River, equidistant from the Ashawano and Post Lakes, of said river; thence to the Falls of the Pashaytig River of Green Bay; thence to the junction of the Neesaukootag or Burnt Wood River, with the Menominee; thence to the Big Island of the Shaskinaubic or Smooth Rock River; thence following the channel of the said river to Green Bay, which strikes between the Little and Great Bay De Noquet. Reference to modern maps shows that Post Lake is situated in the Northern boundary line of Langlade County, and is situated in town 34, range 11 East. Shawano Lake is situated in town 27, range 16 East. A point midway between these two places would carry the point referred to in the Chippewa treaty to a point on Wolf River in Langlade County, town 31, range 14 East. Plover Portage is located about three miles South of Stevens Point and in town 23, range 7 East. By running a line from Plover Portage to a point equidistant between Post and Ashawano Lakes, practically all of the present reservation is included.

Reference to the map of David R. Burr, Draftsman to the House of Representatives, prepared in 1836, shows the grant to the New York Indians correctly, and shows where the Wolf River crosses said line, as set out in the treaty of 1836. Post Lake, however, is improperly located and should be in the latitude of 45 degrees 30 minutes. An error was made in assuming that the lake named Ashawano in the Chippewa treaty of 1827 was identical with Lake Little Butte des Mortes. Reference to this map, however, is valuable in showing that the cession to the United States in the treaty of 1836 included a large part of the present reservation and clearly all of the townships in range 16, and we feel positive that all of the townships in range 16 were absolutely ceded by that treaty. The upper forks of the Menominee River is situated $88\frac{1}{2}$ degrees longitude and approximately 46 degrees latitude.

It is difficult at this late date to locate exactly, without a re-survey, just where this line runs, but there seems to be no question but what a large part of the present reservation was absolutely ceded.

It will readily be seen just where the New York Indian grant was, and by following the boundaries of the territory ceded it will be seen that Sections 16 in the Townships in Range 16, were absolutely ceded to the Federal Government by the Treaty of 1836. If this is true, then as to these three sections there can be no question but what the State and its grantees now own absolutely the title, and that title is one of fee simple. If this line is not correct and the boundary is further to the East, so that none of the Sections 16 in Range 16 fall within the cession, then these sections are on the same footing as the rest.

The Western boundary of the territory ceded by the Menominee Indians in 1836 was West of Sections 16 contained within the limits of Range 16 East. It is contended that if this was in fact ceded to the Federal Government in 1836, that it became the property of the State by virtue of its School Grant, and that the State now owns it subject to any conveyance it may have made.

There is no question but what the Treaty of 1848 gave to the United States all of the Indian lands in Wisconsin belonging to the Menominee Indians, and the only limitation is found in Section 8, which reads as follows:

"It is agreed that said Indians shall be permitted, if they desire to do so, to remain on the lands hereby ceded, for and during the period of two years from the date hereof, and until the President shall notify them that the same are wanted."

Each and every one of the opinions of the land department, and even the decision of the Supreme Court of the United States in the case of *Beecher vs. Wetherby*, 95 U. S. 517 wrongfully assumes that the Indians were not notified by the President of the U. S. that their lands were wanted and that they were expected to remove in accordance with the terms of the Treaty.

The complaint alleges and the evidence shows that they were notified to remove, and the petition of the Indians to the Department of the Interior, Exhibit 1, expressly states that they have been notified that they were expected to comply with Section 8 and remove before the end of the two years. In this case the title which the Federal Government got by virtue of the Treaty of 1848 was the absolute fee subject to a temporary right of the Indians to remain for two years, and until the President shall notify them that the same are wanted. When the State of Wisconsin was admitted into the Union the fee to these Sections passed to the State, subject to whatever right the Indians may have had.

In the case of *Beecher vs. Wetherby*, above cited this language is used:

"The convention which subsequently assembled accepted the propositions, and ratified them by an article in the Constitution, embodying therein the provisions required by the Act of Congress as a condition of the grants. With that Constitution the State was admitted into the Union in May, 1848, 8 Stats. at L., 233. It was,

therefore, an unalterable condition of the admission, obligatory upon the United States, that section sixteen (16) in every township of the public lands in the State, which had not been sold or otherwise disposed of, should be granted to the State for the use of schools. It matters not whether the words of the compact be considered as merely promissory on the part of the United States, and constituting only a pledge of a grant in future, or as operating to transfer the title to the State upon her acceptance of the propositions as soon as the sections could be afterwards identified by the public surveys. In either case the lands which might be embraced within those sections were appropriated to the State. They were withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of lands in Wisconsin could be construed to embrace them, although they were not specially excepted. All that afterwards remained for the United States to do with respect to them, and all that could be legally done under the compact, was to identify the sections by appropriate surveys; or, if any further assurance of title was required, to provide for the execution of proper instruments to transfer the naked feet, or to adopt such further legislation as would accomplish that result. They could not be diverted from their appropriation to the State."

In *Cooper vs. Robert*,^s reported in the 18th of How., 173 (59 U. S., XV., 338), this court gave construction to a similar clause in the compact upon which the State of Michigan was admitted into the Union, and held after full consideration, that by it the State acquired such an interest in every section sixteen that her title became perfect so soon as the section in any township was designated by the survey. 'We agree,' said the court, 'that, until the survey of the township and the designation of the specific section, the right of the State rests in compact-binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have

no authority to mark out and define the land which shall be subject to the grant. But, when the political authorities have performed this duty, the compact has an object upon which it can attach, and if there is no legal impediment, the title of the State becomes a legal title. The *ius ad rem*, by the performance of that executive act, becomes a *ius in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others.' In this case, the township embracing the land in question was surveyed in October, 1852, and was subdivided into sections in May and June, 1854. With this identification of the section, the title of the state, upon the authority cited, became complete, unless there had been a sale or other disposition of the property by the United States previous to the compact with the State. No subsequent sale or other disposition as already stated, could defeat the appropriation. *Beecher vs. Wetherby*, 95 U. S. 517.

The opinion of the Assistant Attorney General Shields, to the Secretary of the Interior, dated November 10, 1890, uses this language:

"Under the rulings in *Beecher vs. Wetherby*, it would seem to be clear that the fee simple to the School Sections within the present Menominee Reservation, had passed from the United States to the State of Wisconsin."

Exhibit "F", Bill of Complaint, p. 44.

The most advanced theory of this court with reference to unsurveyed public lands may be stated as follows:

"The right of occupancy belonging to a tribe of Indians is a sufficient incumbrance, so that lands so encumbered are not public lands within the meaning of the enabling acts, and that therefore until they do become public lands, and while they are encumbered, Congress may make such disposition of them as it sees fit. It may make a permanent reservation out of a tem-

porary one, or it may make a military reservation or a public park. Therefore a section encumbered by the right of occupancy in a tribe of Indians, is not to be classed as public lands, and until it is public lands the

State has not got the ultimate fee."

This is in effect the ruling in the case of *Minnesota vs. Hitchcock*, 185 U. S. 373.

We contend that this reasoning does not apply to the case at bar for three reasons:

1—The case of *Beecher vs. Wetherby* has established a rule of property relative to this identical reservation, and that decision controls so far as this reservation is concerned.

2—The language has no application for the reason that when President Filmore notified these Indians that this land was wanted, and that they should remove in accordance with their treaty, on October 18th, 1850, these lands then and there became public lands free from every condition and restriction.

3—The lands were surveyed and sections identified before the treaty of 1854.

The rule has become elementary that Indians, no less than the United States, are bound by the plain import of the language of an Act of Congress and an agreement conferring substantial benefits on them.

U. S. vs. Mil. Lac. Chippewas, 229 U. S. 498.

The treaty uses plain language and provides only for an occupancy for two years from the date thereof, and until the president shall notify them that the same are wanted. It does not say until they are actually removed. It says simply "until the President shall notify them that the same are wanted."

There is no question but what the President did not notify them, and how this question could have been before this court

and before the Department of the Interior repeatedly, without establishing this important fact, is beyond comprehension. All of the decisions of the Interior Department and Land Office, and even the case of Beecher vs. Wetherby, left out this important element, and expressly state that the Indians were not so notified.

Now, if it be true, and we feel the evidence establishes this fact, that the Indians were so notified, then it must follow that every condition of the treaty was complied with, and the United States became the owner in fee simple of all of the land in the cession of 1848, free from any claim of the Indians, and that its title was perfected on the 18th day of October, 1850. This being the last day to remove.

We wish to call the court's attention here to the fact that at this time the Indians were not located upon the lands in controversy in this action and that they were not upon any part of their present reservation. They occupied a small part of their former reservation, near land which had been designated by the Treaty of 1831 as Agricultural Land, and it was this tract for which they petitioned President-Filmore for permission to occupy. It was to this location that the President's orders, contained in the bill filed marked Exhibits "B", "I" and "J", related. By the President's orders they were permitted to remain at the location where they were, and were required as a condition to so remaining to not interfere with the surveys. At that time the lands around Lake Winnebago were being surveyed, and they were allowed to remain there until fully surveyed. They were then allowed to remove to another part of the vast domain, which they had ceded, but never occupied. It was in 1852 that they moved to their present reservation. Could it be said that the lands around Lake Winnebago were subject to the Indian right of occupancy after the surveys were completed and they moved away? Could the Indians acquire a right on their present reservation by temporarily moving there? They were not in possession of these lands until three years after they were notified that the lands were wanted. The present reservation is approximately 50 miles from where they

were when the petition was directed to the President for permission to remain longer than October 18, 1850. The objection raised by the Indians was the moving in October to a new home. They had never lived upon the present reservation and had never occupied it, and we contend that the only land they had any claim to what ever was the land around Lake Winnebago, which they were actually occupying. How the Indians could shift this right of occupancy from one part of the State to another and encumber the lands which had been given to the State, which had in fact been surveyed, is more than we can comprehend. We wish to call the court's attention to Exhibit "I", which relates to the third extension of time allowed the Indians, and particularly to that part which reads as follows:

"The time limited by the President for the removal of these Indians will expire on the first day of June ensuing, and as weighty reasons exist why they should not be removed at that time, I recommend that an order be issued by the President permitting them to remain until the first day of June, 1852, on the condition that they do not interfere with the surveys, and with the distinct understanding that this extension of time is an act of favor, and that they are still subject to removal at the discretion of the President."

Now, this language makes it plain that the Indians had no title of any kind to the lands they occupied, much less to the lands they did not occupy. The fact that surveys were being made, shows that the Federal Government never for a moment conceded that the Indians had any title to the lands they occupied, much less to the lands they did not occupy, which constitute the present reservation. Indian reservations are not as a rule surveyed. The surveys here show unmistakably that the Federal Government considered, and the Indians considered, that all title to all lands in Wisconsin belonged to the United States free from any claim of the Indians after October 18, 1850.

Why was the consent of the State of Wisconsin obtained to permit these Indians to occupy these lands temporarily, if the

lands constituting Sections 16 did not belong to the State? The Treaty of May, 1854, proclaimed August 2nd, 1854, establishes the present reservation as a permanent home for these Indians. It has been repeatedly held that such a grant to the Indians gives them the mere right of occupancy. In order to sustain the claims of the defendant in this action it is necessary to hold that the Indians had that right prior to 1854. If this is true it must follow that part of the treaty of 1854 is surplusage. Congress can hardly be thought to have made a Grant to these Indians as a permanent home, if they already had such a permanent home.

All of the authorities agree that the State of Wisconsin has the ultimate fee to Sections 16 within this Reservation, and these decisions were rendered without knowing that the President of the United States had notified these Indians to remove. Without such an order of removal it was considered that the Indians had such an interest under the Treaty of 1848 as to give them a right of occupancy. It is upon this theory that all of these cases were decided. The following language used by Justice Lamar, while Secretary of the Interior, states clearly the rights of the State under the School Law Grant:

"The true theory is this: That where the fee is in the United States at the date of survey, and the land is so encumbered that full and complete title, and right of possession cannot then vest in the State, the State may, if it so desires, elect to take equivalent lands in fulfillment of the compact, or it may wait until the right and title, or possession unite in the Government, and then satisfy its grant by taking the lands specifically granted."

This view he considered as fully sustained by the decisions of the courts and the opinions of the Attorney General, and cited support of it *Cooper vs. Roberts*, 18 How. 173; 3 Ops. Atty. Gen. 56; 8 Ops. Atty. Gen. 255; 9 Ops. Atty. Gen. 346; 10 Ops. Atty. Gen. 430; *Ham vs. Missouri*, 18 How. 126.

This language is quoted approvingly in the case of *Minnesota vs. Hitchcock*, 185 U. S. 373.

Taking this as a foundation we ask, did not the United States completely extinguish the Indian title and survey these lands prior to the Treaty of 1854? The Treaty of 1848 ceded all of these lands to the United States and provided that the Indians be allowed to remain for two years, and until notified that the lands were wanted. The Indians were notified that they were expected to remove to their new home in Minnesota. The Government surveyed these lands and identified each Section by a survey prior to the Treaty of 1854. What more could the Government have done to extinguish the Indian title? The only remaining thing it could have done was to have taken the Indians bodily and moved them off. They did not occupy any part of the present reservation, and so even the latter alternative could not have been resorted to. The State of Wisconsin has always claimed these lands, and the title was completely vested in the Federal Government, so that in the event that it should be held that these were not public lands, and that the case of *Beecher vs. Wetherby* was wrongfully decided, still we say these lands became public lands October 18th, 1850, and under the authorities passed to the State at that time under its School Grant.

The resolution of the State of Wisconsin allowing a temporary occupancy could grant nothing more nor less than a license and can be construed in no other light. It expressly provides for a temporary occupancy. Subsequently thereto the State issued patents in fee, and now claims that the Indians have no title and in this suit alleges that its title be quieted as against any of the claims of these Indians. It certainly cannot be claimed with any effect to this court, that the resolution permitting the Indians to temporarily occupy this land has now any effect whatever upon the right of the State or its grantees.

The case of *United States vs. Thomas*, reported in 151, U. S. 577, is the basis for the opinion of *Wisconsin vs. Hitchcock*, reported in 26 Supreme Court Reporter, page 498. Both of these cases sustain the right of the complainant in this action. In the *Thomas* case this language is used:

"We therefore are of the opinion that by virtue of the treaty of 1842, in the absence of any proof that the Chippewa Indians have surrendered their right of occupancy, the right still remains with them, and that the title and right which the state may claim ultimately to the sixteenth section of every township for the use of schools is subordinate to this right of occupancy of the Indians, which has, so far as the court is informed, never been released to any of their lands, except as it may be inferred from the provisions of the treaty of 1854. That treaty provided for permanent reservations, which included the section in question. The treaty did not operate to defeat the prior right of occupancy to that particular section, but, by including it in the new reservations, made as a condition of the cession of large tracts of land in Wisconsin, continued it in force. The State of Wisconsin, therefore, had no such control over that section or right to it as would prevent it being set apart by the United States, with consent of the Indians, as a part of their permanent reservation. So, by authority of their original right of occupancy, as well as by the fact that the section is included within the tract set aside as a portion of the permanent reservation in consideration of the cession of lands, the title never vested in the state, except as subordinate to the right of occupancy of the Indians."

United States vs. Thomas, Vol 14 Sup. Ct. Rep. 426.

We wish to call the court's attention to the important fact in the Thomas case and upon which the whole decision rests, viz: That the Indians stipulated for the right of hunting and fishing until they were ordered to remove and that no executive order was ever made. In the case at bar this executive order was made. Even in the Thomas case there is no contention made, but what the State of Wisconsin held the fee subject to the Indians' right of occupancy.

The right of a State to wait until the extinguishment of an

encumbrance of this kind and then take Section 16 is admitted by practically every decision of this court, and of the Land Department. Even Congress has seen fit to legislate on this matter clearly recognizing this rule. The Act referred to is the Act of February 28, 1891 (26 Stats. 796).

The part of that Act which affects this question reads as follows:

"And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory, where sections sixteen or thirty-six are mineral land, or are included within any Indian, military or other reservation, or are otherwise disposed of by the United States: Provided, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be waiver of its right of said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory, to compensate deficiencies for school purposes where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein: but such selections may not be made within the boundaries of said reservations: Provided, however, That nothing herein

contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein; but nothing in this provision shall be construed as conferring any right not now existing."

This branch of the case we have argued in an attempt to show that the State of Wisconsin and its grantees are the owners of the fee simple to Section 16 on this Reservation.

In case this court should determine that the State of Wisconsin has the ultimate fee subject to the Indians' right of occupancy and this should follow, unless the court holds that the State has the fee simple, then it is important to determine just what rights the Indians have. Congress has not seen fit to alter the purpose of this Reservation, and so has not in any way affected the State's ultimate fee, and the Indians now have only the right of occupancy. The right of occupancy, is as sacred, no doubt, as the right to the fee, but that right of occupancy does not give the Indians the right to commit waste at pleasure. The exact nature of the Indians' title where similar language was used was decided in the case of *United States vs. Cook*, 19 Wall. 591. It was there held that the Indians have only the right of occupancy. This decision relates to this Reservation and the following language is used:

"The right of the Indians in the land from which the logs were taken was that of occupancy alone. They had no power of alienation except to the United States. The fee was in the United States subject only to this right of occupancy. This is the title by which other Indians hold their lands. It was so decided by this court as early as 1823, in *Johnson vs. McIntosh*, 8 Wheat. 574. The authority of that case has never been doubted. 1 Kent. 257; *Worcester vs. Ga.*, 6 Peters 580. The right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is

only a right of occupancy. *Cherokee Nation vs. Ga.*, 5 Pet. 48. The possession when abandoned by the Indians attaches itself to the fee without further grant."

Cherokee Nation vs. Ga., 5 Pet. 17.

This right of use and occupancy by the Indians is unlimited. They may exercise it at their discretion. If the lands in a state of nature are not in a condition for profitable use, they may be made so. If desired for the purpose of agriculture, they may be cleared of their timber to such an extent as may be reasonable under the circumstances. The timber taken off by the Indians in such clearing may be sold by them. But to justify any cutting of the timber, except for use upon the premises as timber or its products, it must be done in good faith for the improvement of the land. The improvement must be the principal thing and the cutting of the timber the incident only. Any cutting beyond this would be waste and unauthorized.

The timber while standing, is a part of the realty, and can only be sold as the land could be. The land cannot be sold by the Indians, and consequently the timber, until rightfully severed, cannot be. It can be rightfully severed for the purpose of improving the land, or the better adapting it to convenient occupation, but for no other purpose. When rightfully severed it is no longer a part of the land, and there is no restriction upon its sale. Its severance under such circumstances is only a legitimate use of the land. In theory at least, the land is better and more valuable with the timber off than with it on. It has been improved by the removal. If the timber should be severed for the purpose of sale alone, in other words, if the cutting of the timber was the principal thing and not the incident, then the cutting would be wrongful, and the timber when cut, become the absolute property of the United States.

These are familiar principles in this country, as well settled, as applicable to tenants for life and remainder—men. But a tenant for life has all the right of occu-

pancy in the lands of a remainder-man. The Indians have the same rights in the lands of their Reservation. What a tenant for life may do upon the lands of a remainder-man the Indians may do upon their reservation, but no more."

U. S. vs. Cook, 19 Wal. 591.

These authorities hold as plainly as any can hold that the fee of the Menominee Indian Reservation belongs to the United States. Of course, this does not relate to Section 16, since that was not involved. By force of reasoning in *Beecher vs. Wetherby* and *U. S. vs. Cook*, herein cited, it must follow that the State has the ultimate fee, and that it has parted in some instances with a part of it to its grantees. That position placed the Indian as a tenant for life, and as such they have no right to cut the timber upon these lands and appropriate the timber and proceeds to their own use, with no idea or intention of improving the land.

In case this court holds that the State of Wisconsin and its grantees have not the absolute title, but only the ultimate fee subject to the Indians' right of occupancy, then it must follow that the Indians are threatening or committing waste upon these lands, and should be enjoined.

The rule of property established by the case of *Beecher vs. Wetherby*, 95 U. S. 517, should not be altered. On the strength of this decision the land office rendered many decisions, in each and every one of which it was held that the State of Wisconsin holds the ultimate fee to the School Lands, in this Reservation, subject only to the Indians' right of occupancy. That the United States has no interest in these lands other than to protect the Indians in the enjoyment of that right. Congress has no right to make a different disposition of these lands, to create a military reservation or park out of them, for the reason that this decision and the decisions of the land office have fixed the status of these lands. In those decisions these Sections 16 upon this Reservation were designated as public lands, and within the School Grant, but that all that the State must do is

to await the extinguishment of the Indian right of occupancy. To apply the rule laid down in the case of *Minnesota vs. Hitchcock*, 185 U. S. 373, in which there appeared many distinguishing facts, and to hold that these sections were not public lands, would be over-ruling the case of *Beecher vs. Wetherby*, and all of the decisions of the land department. This would infringe upon the right of innocent persons, who have acquired title relying upon the decision of this court, and the decision of the land department.

In the case of *Minnesota vs. Hitchcock*, great stress is laid upon the decisions of the Land Department, and these are frequently quoted by this court with approval. Surely all persons would be justified in accepting the decisions of the Land Office and the Supreme Court decision in the case of *Beecher vs. Wetherby* as the law of the land. Many of the grantees of the State purchased from the State, and from each other, since the case of *Beecher vs. Wetherby*. We contend that the decision of *Beecher vs. Wetherby* and the opinions of the Attorney General, and the decisions of the Land Department, each and every one give to the State of Wisconsin the ultimate fee, subject only to the Indians' right of occupancy.

As before stated, these opinions all were based on the theory that the Indians had never been ordered to remove by President Filmore. As a matter of fact that order was made, and with that in the case it makes it plain that the State and its grantees are entitled to the fee simple title. They certainly are entitled to the ultimate fee given them by all of the authorities, subject only the Indians' right of occupancy.

The State of Wisconsin has always claimed the absolute title to these sections. It was with some surprise to the State that the rule was announced in *Beecher vs. Wetherby*, 95, U. S. 517, that the Indians had a right of occupancy in these sections. Many patents had been issued by the State prior to the decision in the case of *Beecher vs. Wetherby*, and no question was raised but what the State held the absolute title. As hereinbefore set out, the case of *Beecher vs. Wetherby*, which holds plainly

that the State has the ultimate fee, was not presented to the court on the theory that an order of removal had been made by the President of the United States and that a large part was ceded to United States in 1836. Had this been presented to this court there can be no doubt but what this court would have held that the Indians did not even have a right of occupancy in these lands. The fact that Congress set out for a permanent home, a tract of land without exception which included sections 16, did not indicate that Congress made claim to sections 16. The Indians would acquire no title unless the United States had title to give, and the United States had no title to Sections 16, since it had parted with that title to the State. All that the Indians would acquire by virtue of the treaty of 1854 was the right of occupancy within the defined territory, excluding sections 16.

No hardship will be done for the Indians in case this court should hold that the absolute title to these lands is in the State and its grantees. Congress has repeatedly remunerated Indian tribes under similar circumstances. Besides the Indians are not entitled to remuneration, since it was never intended by Congress that the State should lose its right to sections 16 and that the Indians should acquire that right by the treaty of 1854.

Contention is made that the State of Wisconsin assented to the present reservation and by some mysterious manner is now stopped to question the Indian's right of possession. Counsel has evidently overlooked the Wisconsin Constitution in making this argument, and has failed to notice that a resolution of the State of Wisconsin cannot by the terms of our constitution give title to this land to anybody. Our constitution provides in Article 4, Section 17, as follows:

"The style of the laws of the state shall be:

'The people of the State of Wisconsin represented in the Senate and Assembly, do enact as follows: No law shall be enacted except by bill.'"

Clearly no claim can be made that the resolution of 1853 became a law of the State of Wisconsin.

A resolution is not a statute, but merely a form in which the legislative body expresses an opinion. A resolution is of a special and temporary character.

"A legislative body may by a resolution express an opinion, may govern its own procedure within the limitations imposed on it by its constitution or authority, and, in case it have ministerial functions, may direct their performance, but it cannot adopt that mode of procedure in making laws, where the power which created it has commanded that it shall legislate in a different form."

City of San Antonio vs. Mickeljohn, 89 Tex. 79;

City of Patterson vs. Barnet, 46 N. J. Law 62.

Counsel for defendant lays great stress upon the Resolution of 1853 and tries to read into that a grant by the State of Wisconsin to the Menominee Indians of School Section 16, and a forfeiture of our school grant within the limits of this reservation. The resolution is of very little force when it is considered that:

First—It is not a law of the state within the meaning of our constitution.

Second—That resolution fixed the territory occupied by the Indians and to which the consent of the state is attempted to be given as follows: "Beginning at the South East corner of Township 28, Range 19, thence West 30 miles, North 18 miles, East 30 miles, South 18 miles to the place of beginning."

Third—At this time the Indians were located only temporarily upon this land, and to construe the state's consent to a temporary occupancy into a permanent grant is unfair to the state and its people.

Fourth—The State of Wisconsin by a law could not consent to surrender section 16 to the United States.

Under the first sub-division enough has been said to show

that the Resolution of 1853 is not a law of the State of Wisconsin.

Under the second sub-division it is plain that the consent of the State of Wisconsin, even a resolution, was never given to those parts of the present reservation included in townships 28, 29 and 30, ranges 13 and 14.

Under the third sub-division the court will also take judicial notice of the fact that in 1853 the Menominee Indians occupied some of these lands only temporarily, having been moved from the mouth of the Wolf River, so as to throw that territory open to settlers, and so as not to have any interference on the part of the Indians. It is plain that it was to this temporary occupancy that the state's resolution was directed.

With reference to the fourth proposition, even if the State of Wisconsin had by a law passed after the treaty of 1854, attempted to grant school sections 16 to the United States, still, the act would be nugatory. If a regularly passed statute enacted after a permanent reservation had been created, and for the express purpose of forfeiting the state's land is nugatory, how much more so must a simple resolution be, passed before the creation of the reservation? Our constitution provides in Sections 7 and 8 as follows:

"Article 10—Section 7: The Secretary of the State, Treasurer and Attorney General shall constitute a board of commissioners for the sale of the school and university lands, and for the investment of the funds arising therefrom. Any two of said commissioners shall be a quorum for the transaction of all business pertaining to the duties of their office."

Section 8: "Provision shall be made by law for the sale of all school and university lands after they shall have been appraised; and when any portion of such lands shall be sold and the purchase-money shall not be paid at the time of the sale, the commissioners shall take security by mortgage upon the land sold for the sum

remaining unpaid, with seven per cent. interest thereon, payable annually at the office of the treasurer. The commissioners shall be authorized to execute a good and sufficient conveyance to all purchasers of such lands and to discharge any mortgages taken as security, when the sum due thereon shall have been paid. The commissioners shall have power to withhold from sale any portion of such lands when they shall deem it expedient, and shall invest all moneys arising from the sale of such lands, as well as all other university and school funds, in such manner as the legislature shall provide, and shall give such security for the faithful performance of their duties as may be required by law."

When Wisconsin was admitted into the union and this constitution was ratified by Congress, without question it bound the United States to such a construction of this constitution, as to carry out every one of the provisions of it. This constitution provides as plainly as can be that the Commissioners of public lands have complete control of these lands, and alone can make conveyance of them. These lands are held in trust for the schools and can be disposed of in but one way, and that must be as prescribed by law and this constitution.

In the case of *State ex rel Sweet vs. Cunningham*, 88 Wis. 81, it appears that the State of Wisconsin, by Chapter 328, Laws of 1878, had withdrawn from sale certain school lands and reserved them for a state park. It was held that the Legislature of the State of Wisconsin could not divert school lands for any other purposes, nor could it set them apart for a state park, and that it could not withhold these lands from sale. This language is used:

"These lands mostly belong to the school fund of the state. The school fund is a trust fund, and is placed by the Constitution beyond the power of the Legislature to divert it to any other use than the support of the schools of the state. It could not set them, or any of them apart for a state park

Const. Wis. art X sec. 2; *Lynch vs. The Economy*, 27 Wis. 69; *People vs. Allen*, 42 N. Y. 404. Neither could it withhold these lands from sale. That power is confided to the discretion of the commissioners of public lands by the constitution and lies in no other office or body. Const. Wis. art X, sec. 8; *State ex rel Crawford vs. Hastings*, 10 Wis. 525; *McCabe vs. Mazzuchelli*, 13 Wis. 478; *State ex rel Kennedy vs. Brunst*, 26 Wis. 412."

Also see Warvelle on Abstracts, Second Ed., page 165, where this language is used:

"In Wisconsin, the commissioners of school and university lands are alone authorized to convey such lands, and that power can not be transferred to others; hence a patent issued by the Governor and Secretary of State, although in conformity to the general statute regulating patents, would be void and inoperative to pass the title to that particular class of lands."

Now the above authority from the highest court of the state in which these lands are situated, shows without question that the resolution of the State of Wisconsin in 1853 could not in any manner affect the questions considered in this case. The legislature could not by any manner or method grant school sections 16 to the United States, or in any manner lessen the interest of the state of Wisconsin therein.

The counsel for the defendant concedes, as he must, that a great many of the section lines within the present reservation were actually approved before May 12th, 1854, being the date which were actually run before this date, and approved before this date, are those of township 28, Range 13; of township 30, Range 15; of township 28, Range 16; Township 29, Range 16, and Township 30, Range 16. These were not only surveyed, but were actually approved before May 12th, 1854, being the date of the signing by the Indians, of the treaty of that year. As to those sections they were actually identified before the signing of the treaty of 1854.

It is also conceded that this treaty was ratified the 2nd day of August, 1854. Between the date of signing the treaty and its ratification, Town 29, Range 13 was surveyed and run on the ground, as was town 28, range 14; town 29, range 14. It then becomes material to inquire when this treaty, as against the State of Wisconsin, went into effect. It is the rule between the parties to treaty that the signing of the treaty is the date which fixes all of the rights of the parties to it. This, however, is not the rule as to third persons. In this action the State of Wisconsin is the third party, and the question is, when was the State of Wisconsin affected by the treaty of 1854. The rule laid down in situations of this kind, is discussed in the case of *Jackar vs. Magee*, 9 Wall. 33. The following quotation taken from that case shows that so far as any of the rights of the State of Wisconsin are concerned, the date of ratification, to-wit: August 2nd, controls as to when this treaty went into effect:

"It is undoubtedly true, as a principle of international law, that, as respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard, the exchange of ratification has a retroactive effect, confirming the treaty from its date. Wheat, *Int. Law*, by Dana, 336. But a different rule prevails where the treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified. In so far as it affects them, it is not considered as concluded until there is an exchange of ratifications, and this, we understand to have been by this court, in *Arredondo's case*, reported in 6, Peters. The reason of the rule is apparent. In this country, a treaty is something more than a contract, for the federal constitution declares it be the law of the land. If so, before it can become a law, the Senate, in whom rests the authority to ratify it must agree to it. But the Senate are not required to adopt or reject it, as a whole but may modify or amend it as

was done with the treaty under consideration. As the individual citizen, on whose rights of property it operates, has no means of knowing anything of it while before the Senate, it would be wrong in principle to hold him bound by it, as the law of the land, until it was ratified and proclaimed. And to construe the law, so as to make the ratification of the treaty, relate back to its signing, thereby revesting a title already vested, would be manifestly unjust, and cannot be sanctioned."

Jacker vs. Magee, 9 Wall. 33.

It is apparent, therefore, that if this be the true rule, that practically all of the section lines were run in the present reservation prior to Aug. 2nd; five townships were surveyed and approved prior to May 12th, 1854, and three townships were actually surveyed on the ground, between May 12th, 1854, and August 2nd, 1854. The latter three were not approved until after August 2nd.

It is also conceded that all of the section lines have been run and the sections identified and surveys approved up to the present time. The status, therefore, of the sections whose lines were run prior to May 12th, 1854, is somewhat different from those which were run between May 12th, 1854, and August 2nd, 1854, and different from those whose lines were run thereafter. In the cases in which the section lines were run before May 12th, 1854, there is the additional argument that these sections had become identified prior to the treaty of 1854 and were then unquestionably the states. In the other cases the argument still remains that the entire Indian title was extinguished in 1850, and that the Government could not in any manner incumber school section 16, and that the right of the state to them, although resting in compact, was as sacred as any grant could be, and all that was needed was the identification, to complete the state's title. Identification has been had in all cases.

Great stress has been laid upon the statement made in the case of Beecher vs. Weatherby to the effect that the Indians had been removed from the lands which were in controversy in that action. The entire Stockbridge Reservation comprised two townships, and a township and a half were sold. Upon the remaining one-half township the Stockbridge Indians still reside. At no time were they more than a few miles from the lands in controversy, and as a matter of fact still hunt over the township and half sold as much as ever. This land was at their very doors and was without question used by them. If it be assumed that at the time controversy arose in the Beecher case that the Stockbridge Indians were not physically on the land, but lived three or four miles away, and if that fact is relied upon by the defendant in this action to distinguish that case from the case at bar, then it must be apparent that in the case at bar the Indians were never on the land at the time the rights of the state became settled, and in fact that is shown conclusively by the records in the Department of the Interior, which shows that they were removed to their present reservation in 1852. Contracts for their removal at a certain price per head were made. The evidence shows that these Indians did not in fact occupy any portion of this reservation until 1852 and were not in the occupancy of it until that time. If the fact of non-occupancy is material then it is conclusively shown that there was no occupancy in this case. In addition to the facts set out in the Beecher case it is alleged in the complaint shown by the files of the department that the President of the United States ordered the Menominee Indians to remove in accordance with their treaty of 1848. The tract of land ceded by the Menominee by the Treaty of 1848 comprised something like four million acres. They occupied but a small part near Lake Poygan, near the mouth of the Wolf River. This is the part of the reservation which they occupied and to which the two year limitation applied. They not only were ordered to remove to Minnesota, but were actually moved from the territory they were occupying temporarily upon the lands included within the present reservation. Surely it cannot be held that a new occupancy could be created after 1850, which would in any manner defeat

the right of the state to its school sections granted by the enabling act.

The evidence establishes the fact that none of Sections 16 of the present reservation have ever been occupied by the Indians and are not now occupied. The Indians did not occupy any part of Towns 28-29-30, Ranges 13 and 14, until after the treaty of 1854. What they did occupy was a part of the lands included within Ranges 15, 16, 17, 18, 19 of Towns 28, 29, and 30, and that occupancy did not begin until their removal to this land in 1852.

This court has had occasion to quote approvingly from the case of *Beecher vs. Wetherby*, above referred to, very recently. In the case of *United States vs. Morrison* 240, U. S. 192 this language is used: "The land has been occupied by Menominee Indians, but their right was only that of occupancy." "The fee was in the United States, subject to that right, and could be transferred by them whenever they chose."

In the *Morrison* case above cited this court uses this language. "It was said in the opinion, that by the compact with the state (the school grant) the lands were withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of it could be construed to embrace them, although they were not specially excepted, and that after this compact" no subsequent sale or other disposition could defeat the appropriation."

Giving this language its full meaning, we contend that after the lands, free from all incumbrance, by way of Indian occupancy, the United States could not sell or otherwise dispose of them and affect the grant to the state. The United States has not sold or otherwise disposed of these lands prior to survey, within the definition, of these terms laid down by this court in the case of *Ham vs. Missouri* 18, How. 126.

We respectfully ask for the relief prayed for in the complaint.

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U. S. Supreme Court, U. S.
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DEC 14 1917
JAMES D. WAHER,
CLERK.

Original No 7.

In the Supreme Court of the United States
OCTOBER TERM, 1917

THE STATE OF WISCONSIN

vs.

FRANKLIN K. LANE
Secretary of the Interior

} **In Equity**

REPLY BRIEF FOR COMPLAINANT

WALTER C. OWEN,
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Of Counsel

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1917

THE STATE OF WISCONSIN

vs.

FRANKLIN K. LANE
Secretary of the Interior

} Original No. 7
In Equity

REPLY BRIEF OF COMPLAINANT

Counsel for defendant, in their brief, Subd. III, page 28, ask the court to dismiss the bill because, they claim, the State has not sufficient interest in the land to maintain the suit. This is the same question raised on the motion to dismiss the bill.

Of course, the undisputed testimony shows that the State still owns at least two sections.

We submit that the State has unquestioned right to maintain this bill as to **all the lands** described in the complaint.

I.

As we understand the Act of Congress of March 2, 1901, and its evident purpose, the State was thereby granted the express privilege by the United States of maintaining actions to determine the original or present right of a State to school lands within any Indian Reservation; and the State of Wisconsin, by Chapter 95, of the

Laws of 1903, duly accepted the privilege extended to it, and authorized its Attorney General to prosecute such actions.

The Wisconsin Act referred to is as follows:

“Chapter 95.

An Act to authorize the Attorney General to institute suit relative to school lands in Indian reservations.

The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

RIGHTS OF STATE TO BE DETERMINED. Section 1. The attorney general of Wisconsin is hereby authorized to institute suit in the supreme court of the United States, under the provisions of an Act of Congress passed March 2d, 1901, to determine the rights of this State to what are commonly known as school lands, within any reservation or Indian concession within this State, where any Indian tribe claims any right to or interest in said lands, or in the disposition thereof by the United States, and particularly to determine the title to the lands embraced within section 16 in the several townships constituting the present Bad River or La Pointe and the Flambeau Indian reservations within this State.”

When the Act of March 2, 1901, was passed, it was a matter of common knowledge that a large part of the school lands granted by the United States in the early days to the several states, had been conveyed by the several states to divers parties. Presumably the states were obliged to sell the school lands granted to them for the purpose of enabling them to raise money in the early

days—when money was hard to get—to lay the foundation for the education of its girls and boys. In the present case, a large part of the land involved was conveyed by the State at an early day. In view of the well-known fact that the several states own but little of the school lands, the passage of the Act of 1901 would have been almost useless had not the intention been to permit, in actions thereby authorized, the determination of the title to all school lands. It was the intention of Congress to permit in one suit the determination of the question of title to these lands, and thus avoid a multiplicity of actions in various courts and by numerous parties.

The right of the State to maintain this action—even where it has patented the lands to others—seems to have been passed upon and decided by this court in *Wisconsin v. Hitchcock*, 201 U. S. 202, for in the bill in that case it was alleged that patents for nearly all of the lands had been issued by the State. (Statement of the case, page 206 of opinion.)

In *Minnesota v. Hitchcock*, 185 U. S. 373, this court, in determining whether it had jurisdiction of the case, and referring to the Act of Congress passed March 2, 1901, said:

“It is by this legislation in effect declared that the Indians, although the real parties in interest, need not be made parties to the suit; that the United States will, for the purposes of the litigation, stand as the real party in interest, and so far as it could, within constitutional limits, has expressed the consent of the government to the maintenance of this

suit in this court. By the Act, it in effect declares, that it waives all objections on the ground that it is a mere trustee. * * * Can the court say that the United States may not assume such responsibility, may not waive all objections on account of mere matter of trusteeship, and stand in court as the responsible owner against whom all litigation may be directed. * * The controversy is made by the Act of 1901, one to which the United States is a party in interest, a party directly affected by the result."

May it not with equal force and reason be said, that the Act of 1901, supplemented by Chapter 95 of the Laws of Wisconsin for 1903, hereinbefore referred to, in effect declares, that the grantees of the State, although the owners of the legal title and probably the real parties in interest, need not be made parties to any such suit; that the State will, for the purpose of the litigation, stand as the real party in interest, and further, that the United States has, by the Act of 1901, consented to the maintenance of such suits by the State to determine questions of title as to such lands, whether the title still rests in the State, or has been previously conveyed? Further, that the Act of 1901 waives all objections on the part of the United States, that the State may not be the real owner of any school lands in question, and permits the State, in such litigation, to assume a responsibility to its grantees, and to protect and maintain their title.

II.

The State of Wisconsin—irrespective of the wording of its patents or grants—is both morally and legally bound to protect the title it purported to convey to its several grantees. It was through the acts of the officers of the State, in selling this land, that this conflict of title arose, and if any wrong resulted from the several conveyances of the State's grantees, the State of Wisconsin is under both moral and legal obligation to make good its title. A patent is said by this court to be the highest evidence of title, and such being the case, it cannot be lightly disregarded by the authority granting it. Regardless of the fact that there were no express words of warranty contained in the several patents of the State, the State is bound to protect its grantees under its patents.

United States v. Curtner, 26 Fed. Rep. 296.
United States v. Hughes, 11 How. 568.
Hughes v. United States, 4 Wall. 235.
United States v. Stone, 2 Wall. 525.

III.

The State of Wisconsin is, both by general law and the State statutes, obliged to return to its patentees, or grantees under them, the money paid for these lands, together with interest thereon, and also to return all taxes which have been collected because of the supposed ownership of said lands. This not only obligates the State to protect its grantee's title, but gives it an interest in the question of the validity of the title, to protect in its own behalf.

Section 230 of the Wisconsin Statutes of 1915, Transcript, page 187, provides:

"Section 230. In case of the sale of any public lands made by mistake or not in accordance with law or obtained by fraud, such sale shall be void and no certificate of purchase or patent issued thereon shall be of any effect, but the holder of any such certificate or patent shall be required to surrender the same to the commissioners, who shall thereupon order the amount paid for the lands described in the certificate or patent, together with interest thereon from the time of such payment, to be refunded and paid out of the state treasury from the fund to which it has been credited; but no interest shall be paid to any person participating in any such fraud."

See also Section 232, Statutes of 1915 of Wisconsin, Transcript, page 187.

Independent of the statute, it is, we believe, the settled law of the land, that where a patent is issued by a governmental body, and it later develops that no title passes thereby, that the patentee is entitled to have his money refunded.

Where the government seeks to cancel a patent, on the ground of mistake, and no fraud or misconduct on the part of the patentee appears, it is essential that the purchase money be refunded.

32 Cyc. 1057.

Trinidad Coal Co. v. United States,

137 U. S. 167.

United States v. Budd, 43 Fed. 630.

The last case was affirmed in *United States v. Paige*, 144 U. S. 154.

We also submit that the State in its sovereign power—outside of its legal obligation to indem-

nify its grantees for any loss of title—owes the grantees the duty to protect them in their estates under its grants, just as the United States government owes the same duty to its patentees.

This duty of a sovereign power to its grantees is certainly as great, and should give it equal standing in court, as the mere pecuniary liability of a warrantor.

IV.

The State, as sovereign, has and retains continuously an interest and right in the lands. Its power to levy and collect taxes thereon and exercise other governmental functions, would seem to entitle it—independently of all other considerations—to maintain the bill to determine whether or not the title originally passed to the State under the public school grants, or is still in the federal government as trustee or guardian of the Indians or otherwise.

We feel that the right of the State to maintain an action to establish its title for the benefit of these grantees might well be based upon its sovereign obligation to its grantees; and with even greater force on its own interests in the collection of the revenues and the exercise of other governmental control thereof.

The right of the State to maintain this action, as to lands which it has patented, seems, as we have said, to have been settled by this court in *Wisconsin v. Hitchcock*.

It seems also to follow from the opinion in the case of *Minnesota v. Hitchcock*, 185 U. S. 373, that this court unquestionably has jurisdiction in an

action of this kind to determine the rights of the parties under the different Indian Treaties, and that the determination of the State's rights necessarily involves both its right as present owner, as well as its sovereign rights, which last depended upon whether it originally took title or not. It is in effect the determination of the boundaries of the State's exercise of its sovereign functions, and as such a question between the State and the United States primarily. Jurisdiction here seems to follow from the discussion in *Minnesota v. Hitchcock*.

The jurisdiction of this court to determine disputes as to the boundaries between the jurisdiction of the general government and one of the States of the Union is well settled.

United States v. Texas, 143 U. S. 641.

The jurisdiction of this court to determine whether or not the rights of the parties are affected by the various Indian Treaties comes directly within the constitutional grant of jurisdiction. The effect of these Treaties on the rights of the State, necessarily involves the State's right as owner, as sponsor for its grantees, and its right to exercise its governmental powers by taxation or otherwise.

We respectfully submit that on all the grounds mentioned the State is entitled to maintain this bill.

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JOHN C. THOMPSON,

M. G. EBERLEIN, and

R. A. HOLLISTER,

Of Counsel.

STATE OF WISCONSIN *v.* LANE, SECRETARY OF
THE INTERIOR.

IN EQUITY.

No. 7, Original. Argued December 11, 1917.—Decided January 7, 1918.

The grant of sections numbered 16, for school purposes, made by § 7 of the Enabling Act of August 6, 1846, c. 89, 9 Stat. 56, to the State of Wisconsin, was not an unconditional grant *in præsenti*; it was subject to the right of Congress to make other disposition of the land before the sections became identified by surveys finally approved, leaving the State the right to obtain other sections by way of indemnity.

By the treaty of October 18, 1848, 9 Stat. 952, the Menominee Indians ceded to the United States their land-holdings in Wisconsin in exchange for other lands farther west, and a sum of money; but, dissatisfied with the new lands and desiring to stay in Wisconsin, they remained upon the ceded lands during the period of two years allowed by the treaty, and extensions granted thereunder by the President, until, by action of the Indian Department and pursuant to an act of Congress appropriating money for the purpose, they were removed in 1852 to another tract in Wisconsin, selected for their reservation. This removal was at first referred to in the act as temporary, but the Wisconsin legislature, in 1853, assented to their remaining on the tract, and by the treaty of May 12, 1854, 10 Stat. 1064, for the purpose of acquiring the new lands as a permanent home, the Indians relinquished the lands assigned them by the treaty

of 1848, and the United States set apart for their home, to be held as Indian lands are held, a reservation including part of the reservation of 1852, with some additional townships. *Held*, that sections numbered 16, which were embraced by both reservations but were not identified by finally approved surveys until after the reservation of 1852 was made, were by that reservation and the reservation of 1854 "disposed of" within the meaning of the school section grant in the Wisconsin enabling act, and that other sections numbered 16, embraced by the later reservation only, but lacking such identification at its creation, were likewise disposed of; and, as all these sections remained in reservation and subject to the continuing occupancy and rights of the Indians, the State had acquired no title to them and could not restrain the cutting of timber on them by or in the interest of the Indians.

Decree for defendant.

THE case is stated in the opinion.

Mr. John C. Thompson and *Mr. R. A. Hollister*, with whom *Mr. Walter C. Owen*, Attorney General of the State of Wisconsin, and *Mr. M. G. Eberlein* were on the briefs, for complainant.

Mr. C. Edward Wright, with whom *Mr. Charles D. Mahaffie*, Solicitor for the Department of the Interior, was on the brief, for defendant.

MR. JUSTICE DAY delivered the opinion of the court.

This is an original suit brought by the State of Wisconsin claiming title under the school land grant to the State to sections 16 in certain townships in the Menominee Indian Reservation, which lands are alleged to belong to the State or its grantees. The bill seeks to enjoin the defendant, the Secretary of the Interior,¹ and through him the Indian occupants of the land, from cutting timber

¹ The jurisdiction in this case is founded upon the statute set forth in *Minnesota v. Hitchcock*, 185 U. S. 373, 387.

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or committing waste thereon. The townships in controversy are numbers 29 and 30 in ranges 13, 14 and 15; township 29 in range 16; township 28 in ranges 15 and 16. These townships are all included in the treaty reservation of 1854, and those in ranges 15 and 16 also in the reservation of 1852; which treaty and reservations are hereinafter considered.

The question to be decided is whether the school land grant shall prevail over the rights of the Indian occupants.

The enabling act of Wisconsin was approved August 6, 1846, 9 Stat. 56. The State was admitted to the Union on May 29, 1848. The enabling act, § 7, provides: "That section numbered sixteen in every township of the public lands in said State, and where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools."

As to the rights of the Indians, it appears that they had occupied a large territory in the State of Wisconsin, and by various treaties, not necessary now to be dwelt upon, had made cessions to the United States. In 1848 the Indians made a treaty [October 18, 1848, 9 Stat. 952] ceding the remainder of their lands in Wisconsin to the United States, for which they received lands farther west and the sum of \$350,000. This treaty was ratified January 23, 1849. By its terms the Indians were permitted to remain on the ceded lands for two years from October 18, 1848, and until notified by the President that the same were wanted. The Indians did not remove to the West, and in August, 1850, petitioned the President for leave to remain on some of the ceded lands. In their petition the Indians set forth the unsatisfactory character of the lands granted to them in the West, and their desire to remain in Wisconsin. On September 5, 1850, the President gave the Indians permission to remain upon the ceded lands until June 1, 1851; this time was

subsequently extended by the President to October 1, 1852. On September 30, 1851, the local Superintendent of Indian Affairs reported to the Commissioner of Indian Affairs that in pursuance of instructions he had explored the country on the Wolf and Oconto Rivers in Wisconsin for a location for the Menominee Indians, and for that purpose recommended a rectangular tract of land; this tract of land was to commence at the southeast corner of township 28 on the range line between 19 and 20 and run west 30 miles, north 18 miles, and thence back east and south to the place of beginning. The tract embraced 15 townships, 6 of which on the west are included within the limits of the lands described in the treaty of 1854, hereinafter referred to.

On August 30, 1852, Congress appropriated money for the removal of the Indians to the lands designated by the Superintendent. 10 Stat. 41, 47. On November 30, 1852, the Commissioner of Indian Affairs reported to the Secretary of the Interior that the removal of the Menominee Indians, as contemplated by the act of Congress passed the preceding session, had been satisfactorily effected, and that the whole tribe had been concentrated on the designated territory between the Wolf and Oconto Rivers, a location with which they were well pleased, and on which they were anxious to be permitted to remain permanently.

On February 1, 1853, the State of Wisconsin by joint resolution of its legislature gave its assent to this removal, in the following terms:

"That the assent of the State of Wisconsin is hereby given to the Menominee Nation of Indians to remain on the tract of land set apart for them by the President of the United States, on the Wolf and Oconto Rivers, and upon which they now reside, the same being within the State of Wisconsin aforesaid, and described as follows, to wit:

"Commencing at the southeast corner of township 28

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north, range 19, running thence west thirty miles, thence north eighteen miles, thence east thirty miles, thence south 18 miles, to the place of beginning."

On November 26, 1853, the Commissioner of Indian Affairs made a report in which he said that by the treaty of 1848 the removal of the Menominee Indians to a place west of the Mississippi River was contemplated, but that it was thought preferable to concentrate them on the Upper Wolf and Oconto Rivers in the State of Wisconsin, and suggested, among other things, that the Indians could properly remain where they were for many years, without interference with the white population; suggesting, however, that, if such arrangement were to be of a permanent character, a new convention should be made with them, which would be necessary for their relinquishment of the country given to them by the treaty of 1848. This recommendation probably gave rise to the treaty of 1854 [May 12, 1854, 10 Stat. 1064], by which the Indians, for the recited purpose of acquiring the new lands for a permanent home, agreed to relinquish to the United States all lands assigned to them by the treaty of October 18, 1848; in consideration of which cession the United States agreed to give to the Indians for a home, to be held as Indian lands are held, "that tract of country lying upon the Wolf River, in the State of Wisconsin, commencing at the southeast corner of township 28 north, of range 16 east, of the fourth principal meridian, running west twenty-four miles, thence north eighteen miles, thence, east twenty-four miles, thence south eighteen miles, to the place of beginning—the same being townships 28, 29 and 30, of ranges 13, 14, 15 and 16, according to the public surveys." This tract embraced six of the townships included in the Indian reservation of 1852, and six townships to the west thereof. The sixteenth sections in five of the former and four of the latter are here in controversy.

It appears that as to three of these townships the surveys were not approved until February 20, 1854, and as to the other townships the surveys of two were approved October 11, 1854, and of the others on dates ranging from February 6, 1855, to October 3, 1891.

It is evident from a consideration of the terms of the enabling act, section seven, that Congress did not make an unconditional grant *in praesenti* to the State of the school sections; the terms of the grant are that the sections "shall be" granted. Moreover, the grant contemplated that Congress might make other disposition of the lands. The State of Wisconsin's right to the lands in controversy was to be subordinate to such disposition; in which event the State should seek indemnity in other lands for the loss of school sections.

The Menominee Indians by the treaty of 1848 gave up their holdings in Wisconsin, but were not removed to the lands provided for them in the West. They had the privilege of remaining in Wisconsin for two years and until notified by the President that the lands were wanted, this permission was extended, ultimately until October, 1852, in the meantime the Indians were located by the action of the Superintendent of Indian Affairs, and by the act of Congress, with the approval of the President, upon the reservation created in 1852. True, the act of Congress appropriating money for the removal referred to the temporary character of the location, but they were thus located subject to the control of Congress, and, as we have seen, with the consent of the State, if that were needed.

We think this recited action was a disposition, prior to survey, of the school sections, which was clearly within the authority of Congress to make and sanctioned by the terms of section seven of the enabling act. This action being before survey took these lands out of the scope of the grant for school purposes, and made them subject

to ultimate disposition by Congress for the benefit of the Indians. This was accomplished by the treaty of 1854 which adds to the reserved lands six townships on the west and includes the six westerly townships of the reservation of 1852. That treaty is comprehensive in its terms, it recites the unwillingness of the Indians to remove to the lands provided for them to the west of the Mississippi River, and sets forth the purpose to exchange those lands for the lands desired by the Tribe for a permanent home. To that end the Menominee Indians agreed to cede, and did cede, to the United States all lands assigned to them under the treaty of October 18, 1848, and in consideration of this cession the United States gave to the Indians, for a home to be held as Indian lands are held, the lands described in the treaty, in the 12 townships to which we have referred. The occupancy and rights of the Indians so established have never been terminated, but still continue.

In view of these statements of fact, and the purposes of the Government and the Indians in the transactions referred to, we regard the case as controlled by the decision of this court in *United States v. Morrison*, 240 U. S. 192, which deals with a similar grant of lands for school purposes to the State of Oregon. In that case the previous decisions of this court were reviewed, and in concluding the discussion of the effect of such school land grants this court said: "The designation of these sections was a convenient method of devoting a fixed proportion of public lands to school uses, but Congress in making its compacts with the States did not undertake to warrant that the designated section would exist in every township, or that, if existing, the State should at all events take title to the particular lands found to be therein. Congress did undertake, however, that these sections should be granted unless they had been sold or otherwise disposed of; that is, that on the survey, defining the sec-

tions, the title to the lands should pass to the State provided sale or other disposition had not previously been made, and, if it had been made, that the State should be entitled to select equivalent lands for the described purpose." (240 U. S. 201.)

The principles, thus stated, are applicable here. In our view the lands were *otherwise disposed of* by the Indian reservation of 1852, and the treaty of 1854. As we have seen, these dispositions were made before final approval of the surveys identifying sections 16.

It is insisted that this conclusion is inconsistent with the decision of this court in *Beecher v. Wetherby*, 95 U. S. 517. The same contention as to the effect of that decision was made in the *Morrison Case*, *supra*, and of it this court said (p. 205):

"In opposition to this definition of the effect of the donation for school purposes, the appellees rely upon what was said in *Beecher v. Wetherby*, 95 U. S. 517. That was an action of replevin to recover logs cut on a section sixteen in Wisconsin which had been granted by the Enabling Act of August 6, 1846 (c. 89, 9 Stat. 56, 58). The exterior lines of the township in which the land was situated were run in October, 1852, and the section lines in May and June, 1854; and the defendant claimed under patents from the State issued in 1865 and 1870. The land had been occupied by the Menominee Indians, but their right was only that of occupancy. 'The fee was in the United States, subject to that right, and could be transferred by them whenever they chose.' By the treaty of 1848 (9 Stat. 952) these Indians agreed to cede to the United States all their lands in Wisconsin, it being stipulated that they should be entitled to remain on the lands for two years. In view of their unwillingness to withdraw, a further act was passed (10 Stat. 1064) by which a tract was assigned to them embracing the land in controversy. Subsequently, a portion of this reservation

was assigned by another treaty to the Stockbridge and Munsee tribes, and for the benefit of the latter Congress passed the Act of February 6, 1871 (16 Stat. 404, c. 38) providing for the sale of certain townships. The plaintiff asserted title under patents issued by the United States in 1872 pursuant to this act. It appeared, however, that the Indian occupation of the land had ceased before the logs were cut. The court held that the title had vested in the State and hence that the plaintiff had acquired no title by his patents from the United States. It was said in the opinion that by the compact with the State (the school grant) the lands were 'withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of it could be construed to embrace them, although they were not specially excepted'; and that after this compact 'no subsequent sale or other disposition . . . could defeat the appropriation.' But it was also stated that 'when the logs in suit were cut, those tribes (Stockbridge and Munsee) had removed from the land in controversy, and other sections had been set apart for their occupation.' That is, the lands had been surveyed in 1854; prior to that time, there had been no other disposition of the fee by the United States; the title had vested in the State subject at most to the Indian occupancy, and this had terminated. There was abundant reason for the decision that these lands were not embraced, and were not intended to be embraced, in the provisions for sale made by the Act of 1871. What was said in the opinion must be considered in the light of the facts. (*Weyerhaeuser v. Hoyt*, 219 U. S. 380, 394.) The *Heydenfeldt Case* was not cited and cannot be regarded as overruled. See *New York Indians v. United States*, 170 U. S. 1, 18; *Minnesota v. Hitchcock*, 185 U. S. 375, 399-401."

See *Heydenfeldt v. Daney Gold & Silver Mining Co.*, 93 U. S. 634; *United States v. Thomas*, 151 U. S. 577;

Minnesota v. Hitchcock, 185 U. S. 373; *Wisconsin v. Hitchcock*, 201 U. S. 202.

We reach the conclusion that the lands in controversy did not pass under the school lands grant to the State of Wisconsin, and that there should be a decree for the defendant.

It is so ordered.

MR. JUSTICE McREYNOLDS took no part in the consideration or disposition of this case.
